Cold Heading Company *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 7–CA–38768 and 7–CA–38768(2)

October 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND LIEBMAN

On September 17, 1997, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions and a supporting brief.[1] The General Counsel filed cross-exceptions and a supporting brief and an answering brief to the Respondent's exceptions. The Respondent filed a brief in response to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[2] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the recommended Order as modified.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cold Heading Company, Warren, Michigan, and Hudson, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Return to the Warren facility two formax headers and six other pieces of equipment which were located in the Hudson facility unless it can show at compliance, on the basis of evidence that was not available at the time of the unfair labor practice hearing, that those actions would be unduly burdensome."

2. Substitute the attached notice for that of the administrative law judge.

MEMBER LIEBMAN, dissenting in part.

Today, my colleagues find, and I agree, that the Respondent engaged in extensive unlawful conduct to undermine its employees' support for the affiliation of its representative, the Cold Heading Employees Committee (the Committee), with the United Auto Workers (UAW). At the same time, however, they find that the Respondent was privileged, after its unlawful efforts failed, to refuse to bargain with the newly affiliated union. They uphold the Respondent's attack on the validity of the affiliation vote notwithstanding that that attack rests on its about-face on a unit scope position it had held unwaveringly—

[1] On November 17, 1997, the counsel for the General Counsel filed a motion to strike Exh. A to the Respondent's brief in support of its exceptions and those portions of the brief referring to the exhibit and the issues regarding the Respondent's subpoena compliance. We deny the motion but note that the Board has not considered any evidence outside the record.

[2] The Respondent's request for oral argument is denied as the record and briefs adequately present the issues and positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We find no merit in the General Counsel's exceptions to the judge's findings that a majority of ballots were cast against affiliation and therefore the Respondent's refusal to recognize and bargain with the Committee, as affiliated with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO did not violate the Act. Counsel for the General Counsel contends that the Committee never agreed to re-include the leaders in the bargaining unit after the parties had agreed to exclude them. The judge, however, found that the parties never reached a final and binding agreement to alter the scope of the bargaining unit and the leaders, as members of the unit, were eligible to vote in the affiliation election held on July 10, 1996. In adopting the judge's findings and conclusion that the leaders were included in the unit, we further note that the position of leader has been included in the collective-bargaining unit through successive contracts and that insufficient evidence was presented at the hearing to justify a change in the historical bargaining unit. Finally, since we agree with the judge that a majority of employees voted against affiliation, we find it unnecessary to pass on the Respondent's procedural challenges to the affiliation election.

Our dissenting colleague would rely on equitable principles to find that the Respondent is estopped from contesting the affiliation and that it unlawfully refused to recognize and bargain with the Committee as affiliated with the UAW. We note, however, that the General Counsel neither litigated the case on that theory nor made that argument in its exceptions. We therefore decline to address the equitable estoppel analysis in this case.

[5] The judge found, and we agree, that the Respondent's routing of two Formax headers to the Hudson facility and the removal and transfer of machinery from the Warren facility to the Hudson facility violated Sec. 8(a)(3) and (5) of the Act. In order to remedy these violations, the judge recommended the restoration of the equipment to the Warren facility and rejected the Respondent's arguments that the restoration order would be punitive. The judge further concluded that, having litigated the issue at the unfair labor practice hearing, the Respondent should not be allowed to relitigate the issue at the compliance stage. On the basis of the record at the hearing, we agree that a restoration order is warranted. It is the Board's usual practice in cases involving the discriminatory relocation of operations to require the employer to restore the operations in question. *Lear Siegler, Inc.,* 295 NLRB 857, 860 (1989). We shall, however, amend the judge's recommended Order to require restoration of the equipment unless the Respondent can establish at compliance, on the basis of evidence that was not available at the time of the unfair labor practice hearing, that restoration of the relocated equipment is not appropriate. In doing so, we recognize that evidence may come to light after the close of the record in the unfair labor practice hearing that may, if credited and found sufficiently material, establish that the remedy imposed by the Board is no longer appropriate. See *We Can, Inc*., 315 NLRB 175, 176 (1994).

and acted on—for over a year. I cannot agree with my colleagues. As discussed below, equitable principles preclude the Respondent from contesting the affiliation vote. Moreover, in my view, the majority "effectively gives the [Respondent] the power to veto an independent union's decision to affiliate, thereby allowing [the Respondent] to directly interfere with union decisionmaking Congress intended to insulate from outside interference." *NLRB v. Food & Commercial Workers Local 1183 (Seattle-First National Bank)*, 475 U.S. 192, 209 (1986).

Facts

The Union has represented a unit of production and maintenance employees since at least the mid-1970s. Leaders and hourly nonleader employees had been covered under successive collective-bargaining agreements for 20 years. For a year before the June 1, 1993,–May 31, 1996 contract expired, however, the Respondent consistently asserted that leaders were managers and not in the bargaining unit. Specifically, in June 1995, the Respondent unilaterally gave leaders a $1-per-hour raise, instead of the 50-cent raise specified by the contract. In response to committee concern, the Respondent said that the leaders were management and not covered by the contract. In early 1996, when unit employees were working mandatory 12-hour shifts, one leader was leaving work after only 10-hour shifts. When the Committee questioned this, the Respondent said that the leaders were management.

Negotiations for a new contract began around late March 1996. Shortly after May 10, the Committee questioned whether leaders were to be included in the unit. The Respondent's president, Derek Stevens, was adamant that the leaders were to be excluded because they were "management." He insisted, "they're not under this agreement. You're not negotiating for the leaders, they're management." The Committee concurred and, consistent with this agreement, did not bargain on behalf of the leaders. Nor did it object to, or seek bargaining when Stevens again unilaterally granted a 50-cent-per-hour raise to leaders in mid-June.[1]

Also in May 1996, the Committee began to explore affiliation with the UAW. The Committee's negotiating team met with UAW officials and discussed holding an affiliation election. The negotiators told the UAW that leaders had been excluded from the bargaining unit. The Committee and the UAW then agreed that only nonleader unit employees could vote in the affiliation election. The UAW later decided to permit the leaders to vote separately in an "advisory vote" in order to determine whether they were sympathetic to UAW representation.

The Respondent's reaction to the Committee's interest in affiliating with the UAW was swift and severe.[2] The day Stevens heard that employees had met about affiliation, he interrogated them about the meeting, who was pushing the Union, and what employees thought a union could do for them. At 11:30 a.m. on the same day, Stevens convened an employee meeting and again asked the employees, "who in the fuck had a problem," why did they want the UAW, and what did they think the UAW could do for them. At the 3 p.m. bargaining session, Stevens once more resorted to coercive tactics. He told the employee-members of the negotiating team that he did not want to run a company with a militant work force, that he was not going to bring any more machinery into a militant work force, that the UAW was not going to be able to do anything for the employees, and that, if they persisted with the UAW, a lot of families would be hurt.

The Respondent continued with these scare tactics during the period leading up to the affiliation vote. It sent memos to employees warning that affiliation would "seriously jeopardize our future survival and success," and that better wages, benefits, and working conditions "can never be achieved through affiliation with the UAW." And, it retaliated against the affiliation activities by failing to install two Formax headers in its Warren facility (the facility here at issue), and transferring six pieces of equipment from the Warren to the Hudson facility.[3]

During the affiliation campaign and the ongoing negotiations, the parties remained in agreement that leaders were excluded from the unit. On July 10, the vote was conducted, and hourly unit employees voted 81 to 78 to affiliate with the UAW. In their separate advisory vote, leaders voted 23 to 2 against affiliation. The next day, July 11, the Respondent abruptly shifted position and claimed, for the first time in a year, that leaders were included in the unit, and that the affiliation was thereby defeated. Thereafter, it refused to recognize the results of the affiliation or to bargain with the newly affiliated

[1] Employee and committeeman Facknitz testified that Stevens said that he was not going to hold back his "managers" just because people in the bargaining unit didn't want to ratify an agreement. Stevens recalled stating that since the leaders were not voting on the contract, he did not feel that it was fair that they were held up from getting their raise. The General Counsel did not allege this raise as a violation. Indeed, such an allegation would have been inconsistent with the General Counsel's theory that the leaders were excluded from the unit.

[2] The judge found, and the Board agrees, that as early as February 1996, when rumors about affiliating with the UAW were circulating, the Respondent unlawfully threatened employees with job loss if they persisted in trying to affiliate.

[3] The judge found, and my colleagues and I agree, that all of this conduct was unlawful.

Committee because leaders did not have a chance to participate in the vote.

Analysis

The judge agreed with the Respondent that a majority of ballots were cast against affiliation and therefore privileged the refusal to bargain. She found that leaders had been included in the production and maintenance bargaining unit for some 20 years, that during negotiations the parties reached a tentative agreement to exclude them from the unit, but that the Respondent changed its mind after the affiliation vote, but before a final and binding agreement. Applying the legal principle that tentative agreements reached during negotiations are not final and binding, the judge determined that the parties had not reached a final and binding agreement to exclude the leaders from the unit.[4] Accordingly, she decided that leaders were still included in the unit, that they were eligible to vote in the affiliation election, and that affiliation was therefore defeated when their separately cast votes were counted.[5] My colleagues adopt the judge's reasoning.

Although I do not quarrel with the legal principle applied by the judge, I do not find it controlling in this case. Indeed, the Board need not, and should not, decide whether the parties had in fact reached a "final and binding" agreement on the exclusion of the leaders. Rather, I would rely on equitable principles to find that the Respondent is estopped from contesting the affiliation and unlawfully refused to bargain with the newly affiliated Committee.

Necessarily underlying any analysis of this case is the principle that affiliation involves essentially internal union matters. As the Supreme Court made clear in *NLRB v. Food & Commercial Workers Local 1183 (Seattle-First National Bank)*, 475 U.S. 192, 204 fn. 11 (1986), "Congress has expressly declined to prescribe procedures for union decision-making in matters such as affiliation." Thus, "the Act gives the Board no authority to require unions to follow other procedures in adopting organizational change." Id. at 204. Consistent with the Supreme Court's teaching, the Board will interject itself only in the most limited circumstances. Traditionally, the Board has found that an employer's duty to bargain with a recognized representative continues after affiliation, except where an affiliation vote is conducted with less than adequate due process safeguards or where the organizational changes are so dramatic that the postaffiliation union lacks substantial continuity with the preaffiliation union. *Sullivan Bros. Printers,* supra at 562.

As the judge correctly held, the burden is on the party seeking to avoid its bargaining obligation to demonstrate either lack of due process or lack of substantial continuity, and the Respondent failed to meet that burden. Nonetheless, by sustaining the Respondent's defense to its refusal to bargain, the judge, and the majority, effectively have given the Respondent the power to veto this affiliation and thereby "directly interfere with union decisionmaking Congress clearly intended to insulate from outside interference." *Seattle-First National Bank,* supra, 475 U.S. at 209. This veto power is inappropriate in any case but is particularly unjustifiable here. For clear, equitable reasons, the Respondent's opportunistic about-face on the unit exclusion of leaders does not provide an adequate basis for its refusal to bargain or for the Board's "meddling in a union's internal affairs." Id. at 206. By its prior consistent position on leaders, and its course of conduct in attempting to defeat its employees' support for affiliation, the Respondent is estopped from relying on tentative agreement principles to contest the affiliation vote.

The estoppel doctrine is explained in McClintock's *Principles of Equity:*

> The gist of equitable estoppel is that a party who has by his statements of conduct, asserted a claim based on the assumption of the truth of certain facts, whereby he has obtained a benefit from another party, cannot later assert that those facts are not true if thereby the other party will be prejudiced. [McClintock, *Principles of Equity* at 80 (2d 1948), as quoted in *Lehigh Portland Cement Co.,* 286 NRLB 1366, 1382 (1987).]

In adapting the doctrine to the labor law context, the Board stated in *R.P.C. Inc.,* 311 NLRB 232, 233 (1983):

> The gravamen of the harm is not the first party's original conduct but rather the inconsistency of its later position. . . . [T]he key is that the estopped party, by its actions, has obtained a benefit.

The Board has applied the estoppel doctrine in merger and affiliation cases where a union's reliance on an employer's conduct has caused the union harm.[6] In *Lehigh Portland Cement Co*., supra, the Board found that the

[4] The judge relied on *Taylor Warehouse Corp.,* 314 NLRB 516, 517 (1994), enfd. 98 F.3d 892 (6th Cir. 1996) (tentative agreements during contract negotiations are not final and binding) and *Stroehmann Bakeries, Inc.,* 289 NLRB 1523, 1534 (1988) (parties negotiating for contract have ability to make a provision final and binding, but there must be evidence of intent to preclude any further negotiations on provision).

[5] Cf. *Sullivan Bros. Printers,* 317 NLRB 561, 563 (1995) (Board's traditional due-process requirements for affiliation met where, inter alia, there was no evidence that vote did not reflect majority view).

[6] See, e.g., *Lehigh Portland Cement Co.,* supra, and cases cited therein.

employer was estopped from denying the validity of a merger where the employer was aware of the merger and its actions encouraged the union to rely on it. Similarly, in *R.P.C. Inc.,* supra, the Board found that the employer was estopped from withdrawing recognition from the union on the ground that it achieved its representative status through a flawed affiliation process. The Board stressed that the employer knew of the affiliation, and by initially recognizing the union, induced it to believe that the employer would forego any challenge to the affiliation procedure.

Application of this estoppel analysis is justified by the Respondent's conduct in this case.[7] For about a year before the contract negotiations even began, the Respondent consistently asserted that leaders were managers and not in the bargaining unit, and it proceeded to act on that claim. In June 1995, it unilaterally gave leaders a $1-per-hour raise even though the contract called for a 50-cent raise. And, in early 1996, when unit employees were working mandatory 12-hour shifts, one leader worked only 10-hour shifts. When the Committee questioned these matters, the Respondent asserted that the leaders were management and not covered by the contract. The Committee acquiesced and challenged neither.[8] In 1996, during the negotiations, the Respondent's president adamantly insisted that leaders were to be excluded because they were management. The Committee concurred and did not seek to bargain on their behalf or object to a unilateral wage increase granted to them in June. Throughout the negotiations, the parties remained in agreement that leaders were excluded from the unit. Not until it heard the affiliation vote results did the Respondent do an about-face.

These facts make a persuasive case for the estoppel doctrine. Clearly, the Committee was harmed by the Respondent's change of position after the affiliation vote. It relied, to its detriment, on the Respondent's consistent and adamant position, taken long before the negotiations began and maintained during the negotiations, that leaders were management. In reliance on that consistent position, the Committee did not protest or seek bargaining when the Respondent unilaterally granted the leaders a raise. Nor did it seek to bargain on behalf of the leaders in the negotiations. Further, in reliance on the Respondent's consistently held position, the Committee concentrated its efforts in the affiliation campaign on the nonleaders, as the sole bargaining unit members. In short, the Respondent engaged in conduct that caused the Committee to reasonably rely on the "truth of certain facts"—i.e., the exclusion of the leaders from the unit and the parties' agreement to that effect. And, in later shifting course and controverting those "facts," the Respondent caused prejudice to the Union. As the Board has stated, "the gravamen of the harm is not the first party's original conduct but rather the inconsistency of its later position." *R.P.C. Inc.*, supra, 311 NLRB at 233.

While the Committee suffered harm and prejudice, the Respondent clearly benefited. Indeed, its entire strategy was a win-win proposition for itself. First, claiming that leaders were excluded from the unit, it gave them wage increases without opposition from the Committee and avoided bargaining over their terms and conditions. At the same time, it was employing coercive tactics to thwart an affiliation campaign. Then, when it learned the affiliation results, and its tactics seemed to have failed, it did an about-face. Under the majority's decision today, its about-face achieved the defeat of the affiliation it had relentlessly and unlawfully tried to stop.

This leads to another strong reason for applying the estoppel analysis. The Respondent does not attack the affiliation with clean hands. As my colleagues agree, the Respondent attempted to coerce employees to vote against affiliation through unlawful threats, interrogations, and retaliation. When the employees nevertheless voted for affiliation, it seized on the leaders' unit exclusion to challenge the validity of the vote. This shift in position goes beyond opportunism. It is a cynical attempt to invoke and exploit legal principles to frustrate the employees' vote for affiliation, a vote the Respondent tried to prevent by unlawful scare tactics and with which it has no right to interfere. The majority's decision in effect sanctions that conduct and allows the Respondent to benefit from it, to the prejudice of the Committee and the employees who voted for affiliation. Yet, such conduct contravenes the basic policies and principles embedded in the Act, as well as fundamental notions of equity.

The doctrine of equitable estoppel is designed to prevent such a stratagem. I would apply it here, consistent with both the statutory policy that "stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit," and Congressional intent to "insulate union decisionmaking from outside interference." *Seattle-First National Bank,* supra, 475 U.S. at 209. In short, whether the par-

[7] I acknowledge that these cases present factually different scenarios from this case. However, the estoppel analysis in each is analogous and properly applied here.

[8] Given this conduct, the judge's tentative agreement analysis seems particularly misplaced. A year before negotiations even began, the Respondent had already asserted that leaders were management and outside the unit, it had acted on that claim by unilaterally implementing certain changes in the leaders' terms and conditions of employment, and the Committee had acquiesced. Effectively, the leaders' unit exclusion was accomplished before negotiations even began.

ties reached an agreement on the exclusion of leaders that was ultimately "final and binding" is beside the point. The Respondent is equitably estopped from challenging the affiliation on the grounds that a final and binding agreement on leaders' exclusion from the unit was absent. I would find that the Respondent unlawfully refused to bargain with the Committee as affiliated with the UAW.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten you with job loss, plant closure, or other adverse economic consequences because you support, or engage in activities on behalf of, an affiliation between the Cold Heading Company Employees Committee (the Committee) and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (the UAW), or any other union.

WE WILL NOT threaten adverse consequences to your families because you support or engage in activities on behalf of an affiliation between the Committee and the UAW, or any other union.

WE WILL NOT threaten to relocate equipment to other facilities because you support or engage in activities on behalf of an affiliation between the Committee and the UAW, or any other union.

WE WILL NOT interrogate you about your support for and activities on behalf of an affiliation between the Committee and the UAW, or any other union.

WE WILL NOT convey to you that it is futile to support an affiliation between the Committee and the UAW, or any other union.

WE WILL NOT refuse to bargain collectively with the Committee about the decision to relocate equipment to our Hudson, Indiana facility and about the effects of returning the equipment to our Warren, Michigan facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL return to our Warren, Michigan facility two formax headers and six other pieces of equipment which were located in our Hudson, Indiana facility unless it can show at compliance, on the basis of evidence that was not available at the time of the unfair labor practice hearing, that those actions would be unduly burdensome.

WE WILL bargain collectively with the Committee about the decision to relocate equipment to our Hudson, Indiana facility and about the effects of returning the equipment to the Warren, Michigan facility.

WE WILL, within 14 days from the date of the Board's Order, offer Terry Thomas full reinstatement to his former job in the Warren facility or, if that job no longer exists, to a substantial equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer to all employees transferred to the Hudson facility full reinstatement to their former jobs in the Warren facility or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, rescind any adverse action taken against any employee as a result of the relocation of equipment to the Hudson facility.

WE WILL make Terry Thomas whole for any loss of earnings and other benefits suffered as a result of his termination, less any net interim earnings, plus interest.

WE WILL make all employees against whom any adverse action was taken as a result of the relocation of equipment to the Hudson facility whole for any loss of earnings and other benefits suffered as a result of the adverse action, plus interest.

COLD HEADING COMPANY

Amy Bachelder, Esq. and *Kristen M. Niemi, Esq*., for the General Counsel.

Robert W. Morgan, Esq. and *Kay Butler, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in Detroit, Michigan, on January 29–31 and April 7 and 8, 1997. The consolidated complaint, which issued on October 31, 1996, was based on unfair labor practice charges filed on July 19 and August 30, 1996,[1] by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (UAW) against Cold Heading Company (Respondent).

The complaint alleges and Respondent admits that from the mid-1970s until July 11, the Cold Heading Company Employ-

[1] All dates are in 1996 unless otherwise indicated.

ees Committee (the Committee) was the exclusive collective-bargaining representative of the production and maintenance employees employed by Respondent in Warren, Michigan. Respondent further admits that on July 10, an affiliation vote was conducted by the UAW to determine whether Respondent's employees wanted to affiliate with, and be represented by, the UAW. The General Counsel contends that a majority of the ballots were cast in favor of affiliation and that Respondent's refusal to recognize and bargain with the Committee as affiliated with the UAW is a violation of Section 8(a)(1) and (5) of the Act. Respondent contends, inter alia, that a majority of the ballots cast were cast against affiliation and that it properly continued to recognize and bargain with the Committee.

The complaint further alleges and Respondent denies that from February 8 to July 9, agents of Respondent threatened and interrogated employees in violation of Section 8(a)(1). On or about August 22, Respondent removed equipment from its Warren facility and changed plans to install new equipment. The General Counsel alleges that this decision was discriminatorily motivated in violation of Section 8(a)(1) and (3), and that Respondent refused to bargain about the decision and its effects in violation of Section 8(a)(1) and (5). Respondent contends that it had good-faith reasons to remove and relocate equipment and that it did bargain with the Committee about the decisions and its effects.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits and I find that the UAW is a labor organization within the meaning of Section 2(5) of the Act. Respondent further admits and I find that the Committee is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is engaged in the manufacture and nonretail sale of bolts and other parts for the automobile industry. Respondent's primary location is in Warren, Michigan (the Warren facility) and consists of three buildings: the bolt plant, the STG plant, and a shared corporate office/shipping and receiving building. The parties stipulated that as of July 10, 200 employees were employed at the Warren facility: 171 production and maintenance employees and 29 leaders.

Sometime in late 1996, Respondent opened a second manufacturing facility in Hudson, Indiana (the Hudson facility) approximately 165 miles from the Warren facility. At the time of the hearing, approximately 15 to 18 employees worked in the Hudson facility, 5 or 6 of whom had been transferred from the Warren facility.

Respondent is wholly owned by members of the Stevens family and their relatives. Derek Stevens began his employment with Respondent in 1989 and has served as Respondent's president since January 1994. Elmer Cecil is executive vice president and has been employed by Respondent for 27 years. Dave Goss is the plant manager and has been employed by Respondent for over 13 years. Stevens, Cecil, and Goss are admitted supervisors and agents of Respondent within the meaning of the Act.

B. Collective-Bargaining History

Since the mid-1970s, Respondent's employees have been represented by the Committee. The Committee does not have a constitution or bylaws, and members do not pay dues. Employees from each shift elect a representative and these representatives are collectively known as committeemen. The committeemen handle grievances during the terms of the collective-bargaining agreements, and serve as the negotiating team for the Committee during contract negotiations.[2] Committeemen have no fixed terms and serve either until they voluntarily resign, are transferred, or until the employees on their shift petition them to leave and an election is held to select a replacement. The Committee does not have regularly scheduled meetings. When a membership meeting is called, it is held in the bolt plant lunchroom or in a local VFW hall. The Committee has no office or telephone and maintains only a file cabinet in the bolt plant.

Respondent and the Committee have been party to a series of collective-bargaining agreements, the most recent of which is effective by its terms from August 2, 1996, to May 31, 1999. The unit is defined in "Article I—Recognition" as follows:

> The Company recognizes and acknowledges that the Committee is the exclusive representative in collective bargaining with the Company for all full-time production and maintenance employees, excluding clerical employees, temporary and part-time employees, professional employees, sales personnel, guards and supervisors as defined in the National Labor Relations Act.

In the previous collective-bargaining agreement, which was effective June 1, 1993, to May 31, 1996, there was no recognition clause per se. Terms and conditions of employment for the employees covered by the agreement were enumerated by job classifications, and leaders were delineated as covered employees. Kurt Facknitz, an employee and a committeeman, testified that since he was first employed in 1988, leaders were covered under the collective-bargaining agreements. Cecil testified that leaders have served in the past as committeemen. I therefore find the evidence firmly establishes that until 1996, and the events described herein, leaders were included in the collective-bargaining unit.

C. 1996 Preaffiliation Vote Negotiations—March to June 30

Bargaining for a successor agreement began in late March or early April. Six committeemen regularly attended the bargaining sessions: Facknitz, Lou Dimech, Javier Galvan, Anthony

[2] Throughout the hearing, the term "committee" was used interchangeably to refer to the labor organization and to refer to the labor organization's negotiating team. To avoid confusion, I will refer to the labor organization as the "Committee," and I will refer to the negotiating team as such. The parties uniformly refer to the members of the negotiating team as "committeemen" and I adopt that reference.

Simpson, Ron Baker, and Keith Dromowicz. Other committeemen served for interim periods: Audey Stern, Mike Giardot, Nick Renock, Sid Roberts, and Bob Scarintino. Stevens conducted all of the bargaining sessions on behalf of Respondent. There is some dispute as to whether Cecil attended bargaining sessions prior to July 10. Facknitz recalled that Cecil first attended a bargaining session on June 24. Cecil denied that he attended the June 24 session, and stated that he only attended bargaining sessions after July 10. Stevens was not asked whether Cecil was present at the June 24 meeting.

The evidence establishes that in the course of bargaining, as issues were discussed and tentatively agreed, language was typed out and Stevens and each committee member wrote "tentatively agreed" or "TA" on the document. On April 3, Stevens and the committee members wrote "TA" and their respective names or initials on the following language:

RECOGNITION

(Recognition of the Committee)

(a) The Company recognizes and acknowledges that the Committee is the exclusive representative in collective bargaining with the Company for all full-time production and maintenance employees, excluding clerical employees, temporary and part-time employees, professional employees, sales personnel, guards and supervisors as defined in the National labor Relations Act.[3]

It was an established practice of the negotiating team to submit tentatively agreed-on terms to the membership for ratification. Ratification votes were conducted by paper ballot in each of the buildings at the Warren facility. With the exception of Stevens, none of the witnesses remembered exactly how many ratification votes were held during the course of bargaining in 1996 or the exact dates on which the votes were held. Stevens testified, and I find, that ratification votes were held on May 10 and 17, June 18, July 8, and August 1. Thus, the evidence establishes that four ratification votes were held before the July 10 affiliation election, and one was held after the affiliation election.

Witnesses for both sides agreed that the issue of whether of not leaders would continue to be part of the bargaining unit was first raised during collective bargaining by members of the negotiating team, not by Stevens. It is not clear from the testimony what precipitated the issue being raised, and there was some conflict as to whether the issue was raised before or after the first ratification vote on May 10. Facknitz recalled that the issue was first raised prior to the first ratification vote, whereas Galvan and Stevens testified that the issue was first raised after the first ratification vote. Facknitz and Galvan testified that during a negotiating session, Dimech stated that the leaders were asking him whether or not they were still represented by the Committee, and he wanted Steven's position on the issue. Stevens responded that the leaders were not in the bargaining unit because they were management. The issue was discussed several more times during subsequent sessions, and each time, according to Facknitz and Galvan, Stevens said that the leaders were management and that the negotiating team was not negotiating for the leaders. According to Facknitz, the negotiating team accepted Stevens' position and both sides agreed to exclude leaders from the bargaining unit, ostensibly because the leaders were considered supervisors.

Stevens testified that it was the Committee, not Respondent, that wanted the leaders to be excluded from the unit and that he acquiesced to the Committee's demand.

It is not clear whether leaders voted in any of the ratification votes. According to Facknitz, leaders did not vote in any of the ratification votes, although his knowledge was limited to the leaders employed in the bolt plant. According to Dromowicz, leaders did vote in the first ratification vote in the shipping and receiving facility. Galvan recalled instances when leaders tried to vote and Stevens directed them to step out of the voting line, although he could not specify on what dates this occurred.

In or about mid-June, between the second and third ratification votes, Stevens gave the leaders a 50-cent-per-hour increase. In a bargaining session, Dimech reported that employees were ticked off because the leaders got a raise and they did not. According to Facknitz, Stevens responded that he was not going to hold back his "managers" just because people in the bargaining unit didn't want to ratify an agreement. Stevens recalled stating that since the leaders were not voting on the contract, he did not feel that it was fair that they were held up from getting their raise.[4]

D. Interest in the UAW

For many years, it was common during contract negotiations for rumors to circulate about employees and the Committee bringing in the UAW. Galvan testified that sometime in February, Goss called him and an employee named Mark Cantalupo into his office and stated that that he had heard on the floor that they were trying to organize the UAW. Goss warned them that if they persisted in doing that, that they were going to be "fucked in the ass." Goss threatened that jobs were going to be lost, that the Stevens family would not put up with anything like that, and that he would not be surprised if they closed the shop. Goss testified that sometime in February or March, Galvan and another employee named Mark Cantalupo came into his office and asked him how he felt about the UAW. Goss testified that he responded by stating that years ago, he had worked for a company that was involved in the UAW and that his wife currently works for a company where the employees are represented by the UAW and that his wife is a UAW member. Goss continued, "what I told them was that my past experience and my wife's experience, if I owned this company, I personally would put a lock on the fucking doors."

In April, Facknitz contacted Dan McCarthy, president of Local 417 of the UAW. Facknitz met alone with McCarthy at the local union office on April 23 and they discussed the status of negotiations with Respondent. A second meeting was held at the same location on May 2. Present were McCarthy, Facknitz

[3] This language is identical to the language of the recognition clause which was ultimately incorporated into the final agreement.

[4] The granting of this raise to the leaders is not alleged by the General Counsel as violative of the Act.

and the members of the negotiating team, and they discussed a possible affiliation between the Committee and the UAW.

A third meeting was held on May 29, 2 days before the expiration of the collective-bargaining agreement. Present were Georgia Kampf, an organizer with the UAW International, McCarthy, Facknitz, and the members of the negotiating team. At this meeting, Kampf expressed her opinion that if the employees wished to be represented by the UAW, it was more advantageous to go the route of an affiliation election rather than to petition the National Labor Relations Board for a certification election as she was of the opinion that an affiliation election could be conducted much more quickly. There was extensive discussion regarding the composition of the bargaining unit, and whether leaders were included or excluded. Kampf stated that the Committee could not change the contour of the bargaining unit through the affiliation process, and that it was irrelevant whether or not the leaders were sympathetic to the idea of affiliation. She was unequivocally of the opinion that the scope of the bargaining unit determined voter eligibility in an affiliation election, that is, employees who were part of the bargaining unit were eligible to vote, and employees who were not part of the bargaining unit were not eligible to vote.

According to McCarthy, it was clear to everyone at the May 29 meeting that although leaders had historically been a part of the unit, as of May 29, the leaders were no longer included. McCarthy testified that the leaders had not, up until that time, participated in the ratification votes and McCarthy had been told by members of the negotiating team that Stevens didn't want the leaders in the unit and neither did they. In the absence of disagreement on the issue, McCarthy testified that there was an agreement to exclude the leaders, and therefore only nonleaders were eligible to vote in an affiliation election. McCarthy, Kampf, and the legal department of the UAW determined at some point subsequent to the May 29 meeting, however, that if an affiliation vote was held, leaders would be allowed to vote as a separate group. Leader ballots would be segregated from nonleader ballots and counted separately in order to determine whether the leaders were sympathetic to the notion of UAW representation. If so, McCarthy testified that it was his intention that the UAW would advance bargaining proposals to put them back into the unit.

Also discussed at the May 29 meeting was how the Committee would function as the collective-bargaining representative of employees if the employees voted to affiliate with the UAW. McCarthy explained to the negotiating team that they would have access to more and better information, and that they could draw on the experience and resources of the UAW. He told them the makeup of the negotiating team would remain intact, and that the established procedure of requiring ratification prior to adopting a final agreement would continue. The committeemen's method of handling grievances would also continue. McCarthy expressed his opinion that the negotiating team needed some organizational structure, and he recommended they adopt bylaws. He also told them that he expected that employee-members of the affiliated Committee would pay dues to the UAW. McCarthy testified that all UAW collective-bargaining units are bound by the UAW constitution.

E. The Events of June 23

On Sunday, June 23, a meeting was held at a local VFW hall called the Eagle's Hall. The meeting was held on the second floor and approximately 60 employees attended. For the first hour of the meeting, the committeemen spoke to the employees about the possibility of affiliating with the UAW. The committeemen then invited McCarthy and Kampf to join the meeting. There was a question-and-answer session during which McCarthy described how Local 417 would service the bargaining unit, how effective grievance arbitration systems work, and the amount of dues that members could expect to pay. Kampf discussed the process of conducting an affiliation election. The assembled employees expressed a clear interest in affiliation, and it was resolved to have another meeting the following week to give employees who did not attend the June 23 meeting an opportunity to discuss these same matters. McCarthy suggested that a letter be sent to Stevens informing him of the June 23 meeting because, in McCarthy's stated view, Stevens would find out about the meeting anyway and a formal letter advising him of the meeting would serve to better protect the employees who attended the meeting. According to Facknitz, all of the employees present signed a piece of paper agreeing to let McCarthy deliver such a letter. McCarthy stated to the employees that he would write the letter and personally hand deliver it the next morning.

F. The Events of June 24

1. 11 a.m.

On Monday, June 24 at 11 a.m., Facknitz was working at his machine in the bolt plant which was located next to a large bay door. According to Facknitz, Stevens, and Cecil entered the building and Stevens asked Facknitz to step outside. Stevens appeared very shook up, nervous, and upset. Stevens said, "[W]hat's going on? Was there a meeting yesterday? I don't know what's going on. What's going on?" Facknitz said there was a meeting and that he was not going to lie, there was a union representative present. Stevens asked if petition cards were signed, and Facknitz said no. Stevens asked, "[W]hy do you guys want a union?" Facknitz said he didn't know. Stevens pressed further, "[W]hat do they think the Union's going to do for you?" Again Facknitz said he didn't know. Stevens asked, "[W]ho's pushing the Union?" Facknitz said that if Stevens was looking for names, he was talking to the wrong person. Stevens said he understood and walked away.

Facknitz testified that it was not unusual for Stevens to stop by his machine to talk about committee matters, but he recalled this conversation in particular for several reasons. First, Facknitz recalled that Stevens appeared shaken and upset. Second, Facknitz stated that he knew that McCarthy's letter was going to be delivered that day and he was anxious about what would transpire after its delivery. Because Stevens regularly stopped to talk to Facknitz by his machine, Facknitz assumed he would stop and talk to him after he got the letter. According to Facknitz, Stevens did exactly what the NLRB literature said he couldn't do: interrogate him about his union activities. He went home and made a note of the conversation in his scheduler

and told his wife about it. He also reported the conversation to Simpson.

Simpson testified that he was working in the bolt plant and at around 11 a.m. and observed Stevens and Cecil approach Facknitz at his machine. He saw the men talking. After the conversation was over, Facknitz approached Simpson and repeated to him what Stevens had said.

Stevens denied speaking with Facknitz on June 24 at 11 a.m. He testified that he did not enter the bolt plant that day until 11:30 a.m., that he entered alone, and that he walked directly to the lunchroom. Under cross-examination, Stevens admitted that at "some point in time, somewhere" he asked Facknitz the general question "what's going on" and Facknitz told him there had been a meeting with a union representative, and that if Stevens was asking for names, he had come to the wrong guy. Stevens testified, "I don't dispute that, no," his only point being that this conversation did not occur on June 24 at 11 a.m.

Cecil also denied that he was present during a conversation between Stevens and Facknitz on June 24 at 11 a.m. Under cross-examination, he stated that he did witness a conversation between Facknitz and Stevens in the proximity of Facknitz' machine, and it could have been a few days before or a few days after June 24. Cecil recalled that Stevens asked his typical "what's new" and Facknitz said something about either the UAW or the union. Cecil said it was loud in the shop and he could not really hear what was being said. He also said he was not invited to participate in the conversation and backed away and was "absolutely not paying attention" to what was said. He acknowledged that something might have been said about a petition, that there was a question as to who was pushing the union, and Facknitz said he would not say who was involved.

2. 11:30 a.m.

Stevens convened a meeting of employees in the bolt plant lunchroom at 11:30 a.m. Seven witnesses testified regarding this meeting, and the estimates of the number of employees in attendance varied from 20 to 80 employees. Present for management were Stevens, Cecil, and Gregory Heiser, a department manager. Dave Goss, the plant manager, was not present. The meeting lasted anywhere from 20 to 45 minutes, depending on the witnesses' recollections.

Facknitz testified that Stevens was very upset when he began speaking. He recalled Stevens asked what the hell was going on and that he had heard he was going to receive a letter from the UAW concerning affiliation. He said he hadn't received it yet but he wanted to know "who in the fuck had a problem," and that whoever had a problem was "fucking gutless" for not saying it to his face. Stevens said if anybody didn't like their job or had a problem working there, they were welcome to go elsewhere. He said he couldn't believe this, he felt like the employees "stuck it up his ass." He reminded employees of all the money his family had dished out during the years. He repeatedly said, "I can't believe this." He asked the employees what they thought the UAW could do for them and why did they want the UAW. Facknitz specifically recalled Stevens using the term "UAW." At some point during the meeting, Facknitz recalled that Galvan entered the lunchroom, and Galvan addressed Stevens, telling him that the employees didn't have to answer his questions. Galvan said that they would be posting literature on an affiliation vote and that they could talk after that. On both direct and cross-examination, Facknitz testified that Goss was present at this meeting. During cross-examination on rebuttal, however, Facknitz admitted he was mistaken and that Goss was not present. Facknitz further testified on rebuttal that after the meeting, he had a conversation with Heiser wherein Heiser stated that he had seen NLRB literature which had been set out on tables that morning and that he had called Stevens and told him that he better get over "here" and talk to these guys because something was going on with the union. Facknitz said to Heiser that he could not believe how upset Stevens had gotten. Heiser agreed that Stevens had gotten excited and upset. He also told Facknitz that it was wrong to call the Union.

Galvan testified that he walked with Dromowicz from the shipping department to the bolt plant that morning to speak with Facknitz and Simpson and to find out if there was any response to McCarthy's letter. When Galvan and Dromowicz arrived at the bolt plant, they could not find Facknitz or Simpson, and they went to the lunchroom. They entered the lunchroom at about 12:10 p.m., toward the end of the meeting. Galvan testified that he heard Stevens say that he could not believe that the employees were trying to get a union in the plant and that they were cowards and gutless for not approaching him with their problems. Stevens wanted to know why the employees wanted the Union, and stated that the union was not going to be able to do anything for them and that it didn't matter if they had a union or not. Galvan recalled that employees asked Stevens to explain what he meant when he said that the union wasn't going to be able to do anything for them, but he would not elaborate. Galvan could not recall if Stevens used the term "UAW," but he was certain that he used the term "union." He was also certain that Stevens did not use the term "affiliation." Galvan addressed Stevens and said that he had probably received the letter already and that was why he was talking to the employees. Stevens responded that he had not received any letter yet. Galvan asked then how did he know that they were trying to get a union in there, and Stevens said he heard it from someone else. Galvan said the employees didn't have to answer any more of his questions and that it was too late because the affiliation vote was going to take place. Galvan stated that Stevens did not have a right to have this meeting, and Stevens responded that it was his damn company and that he could hold a meeting anytime he wanted and slammed his hand on the table.

Simpson testified that Stevens asked employees if they were happy working there. He said if anyone had a problem working there, to go somewhere else. Stevens called the employees gutless and said that they should say whatever they had to say while he was there, and not when he walked away. One employee stated that it wasn't that the employees were not happy working there, but they had a problem with the contract that was proposed. The employee explained that Stevens wanted them to take less insurance and the employee did not believe that Stevens could not afford a 3-percent wage increase. According to Simpson, Stevens brought up the Union. Stevens asked what could a union do for them and why did they want a

union. He stated that the employees worked with the best equipment and the Company didn't have any safety violations, so what did they think a union could possibly do for them. Stevens said that by having a union, he felt the employees were trying to "stick it up his ass." To this specific sentiment, Simpson asked Stevens why he felt that way, and Stevens responded that given the amount of money his family put out over the years, he didn't understand why the employees would want a union. Simpson recalled that Galvan entered the meeting with Dromowicz and stated that there was going to be an affiliation vote on July 10.

Dromowicz testified on direct examination that on the morning of June 24, Galvan told him that there was a meeting in the bolt plant and that they should walk over there. He entered the lunchroom with Galvan and heard Galvan ask Stevens about receiving a letter. Stevens replied that he didn't know what Galvan was talking about. Dromowicz testified he was present at the meeting for only 5 minutes, and that he heard no mention of the UAW, a union, or affiliation. Dromowicz testified on direct examination that it was his impression that the meeting concerned the repeated failed ratification votes, and he didn't know what Galvan was talking about when he asked Stevens about receiving a letter. On cross-examination, Dromowicz admitted that Galvan may have told him on their way to the lunchroom that a letter from the UAW was being delivered to Stevens that day.

Stevens testified that the purpose of the lunchroom meeting was to talk with employees to find out what would it would take to get the contract ratified. "We talked about a number of issues, but all generally regarding previous contract proposals and general issues along those lines." According to Stevens, the terms UAW, union, and affiliation were never used. Stevens recalled Galvan entering the meeting and asking him if he had received a letter. Stevens said that he not received any letter. Galvan then said that he would be getting a letter and that there was going to be information coming out to employees about an affiliation vote. He also recalled that Galvan told employees they didn't have to answer any questions. Stevens said that after the exchange with Galvan, the meeting continued and he continued to answer questions and talk about the issues regarding ratification. Stevens testified that he had never heard the term "affiliation" before Galvan used it, did not know what it meant, and did not ask Galvan during the meeting what he meant when he used the word.

Heiser testified that Stevens called him that morning and told him he would like to talk to the employees to find out what they wanted and to try to get the contract settled. At the meeting, Heiser recalled Stevens saying that it seemed like they were having a hard time coming to an agreement and he wanted to answer any questions the employees might have. Employees asked questions for about 30 minutes, and there was no mention of the UAW, a union, or affiliation. Galvan entered about twenty minutes into the meeting accompanied by Dromowicz. Galvan asked Stevens if he had received "the letter" yet and Stevens asked, "[W]hat letter?" Galvan said you'll be getting a letter and left. Heiser was not recalled to testify to rebut Facknitz' testimony regarding their conversation following the meeting.

Cecil testified that he saw Stevens at around 9:30 a.m. that morning, and Stevens said there was going to be a meting in the lunchroom. Cecil walked over to the bolt plant at around 11:30 a.m. and he saw Stevens right outside the lunchroom. At the beginning of the meeting, Cecil recalled Stevens stating that he was there to answer any questions regarding the ongoing negotiations. At that point, someone came up to Cecil and whispered to him that he had an important phone call. Cecil left the lunchroom, and took the call in a nearby office. On the phone was Nicole Goddard, Stevens' secretary, who told Cecil she had just received a letter from the UAW and asked if she should open it. Cecil told her not to open it and that Stevens would be over shortly. Cecil testified that Goddard was very upset and that it took him 8 to 10 minutes to calm her down. He testified that he walked back to the lunchroom, but there was a crowd in front of the door and he remained outside because he didn't want to break through the crowd and be "rude." He did not make his way back into the lunchroom until the very end of the meeting. He did hear Galvan say to Stevens that he was not supposed to be talking to the employees and he heard Galvan ask Stevens if he had received the letter. Stevens responded he did not get a letter, and that he would talk to whomever he wanted. The meeting ended 3 or 4 minutes after Cecil reentered the lunchroom. Cecil testified that he did not tell Stevens about the phone call from Goddard, or the fact that a letter from the UAW had arrived, as he did not see any urgency to the situation.

3. 11:45 a.m.

McCarthy arrived at Respondent's main office at approximately 11:45 a.m. He gave a letter to the receptionist who assured McCarthy that she would see to it that Stevens received it. Later that afternoon, McCarthy received a telephone message that Robert Morgan, Esq., counsel for Respondent, had called at 1:25 p.m. McCarthy returned Morgan's call at around 3:30 p.m., and Morgan indicated to McCarthy at that time that Respondent had received his letter. The letter stated that the UAW was assisting Respondent's employees in their efforts to affiliate with the UAW.

4. 3 p.m.

A previously scheduled bargaining session between Stevens and the negotiating team was held at 3 p.m. The undisputed participants in this meeting were Stevens, Facknitz, Galvan, Simpson, Baker, and Dromowicz. Facknitz and Galvan were not sure if Cecil was there, Simpson said he was not there, Dromowicz said he was there, and Stevens wasn't asked whether he was there or not. Cecil denied attending this bargaining session.

Facknitz testified that Stevens continued his tirade from the lunchroom meeting and reiterated that he felt like they had "stuck him in the ass." Stevens stated that this could hurt a lot of families. He also stated that he didn't want to run a company with a militant work force and that he wasn't going to bring any more machinery into a militant work force. Facknitz testified that it may have been at this meeting that Stevens also said that if the employees wanted the UAW and if it was lawful, that he would recognize the UAW.

Galvan testified that the entire discussion at the bargaining session concerned the UAW, and that there no was no discussion about contract proposals. Stevens stated that he felt like he had been "fucked in the ass," that he and his family had dished out a lot of money over the years and he didn't understand why the employees wanted a union. According to Galvan, Stevens stated that the union wasn't going to be able to do anything for them, and that if they persisted in trying to bring the UAW in, a lot of families would be hurt. When the committeemen asked what he meant by families being hurt, Stevens repeated the statement but did not elaborate further. Like Facknitz, Galvan recalled Stevens stating that he would not bring any new machinery into a militant atmosphere. Stevens also said that he would recognize the UAW if it was lawful to do so, but he did not think it would be a wise decision to bring the in the UAW.

Simpson's testimony about this bargaining session was corroborative of Facknitz' and Galvan's testimony. Simpson recalled that Stevens asked why the employees would want a union. He recalled Stevens stating that he couldn't believe that they wanted a union, that there would be consequences if they affiliated with the Union, that jobs would be lost and families would be hurt, and that although he planned on bringing new equipment into the facility he would not bring new equipment into a militant environment.

Dromowicz testified he really didn't recall much about this meeting, and did not recall any discussion about affiliation.

Stevens testified that during this session, he expressed his opinion that the UAW would not offer anything to the employees because it was Respondent's practice to be the highest paying company in the industry and because Respondent had the best safety record and working conditions. He testified that he stated that Respondent would nevertheless recognize an affiliation if it was required to do so by law. On cross-examination, Stevens admitted that he said that bringing in the UAW would hurt families. He also admitted that he asked the committeemen why they wanted to affiliate with the UAW, and that he asked, in rhetorical fashion, why should he bring new equipment into a "militant environment."

G. Notice of the Affiliation Election

In late June and early July, Facknitz, Galvan, Simpson distributed copies of a notice advising employees of the affiliation election scheduled for July 10. Copies were handed out to individual employees and posted near time clocks, in lunchrooms, locker rooms and on tables where literature was normally placed in all three buildings of the Warren facility.[5] The notice announced the date, time and place of the election and invited every member of the bargaining unit to "attend, discuss the issue and vote."

H. The Events of June 30

On Sunday, June 30, McCarthy held a second meeting with the Respondent's employees at Eagle Hall. Approximately 60 employees attended, and McCarthy noticed many new faces from the week before. The issue of leaders eligibility to vote in the election was raised, and McCarthy testified that he made it clear that leaders could not vote because they were out of the unit and that was "settled business." On cross-examination, McCarthy testified that as of June 30, everyone was happy with the leaders exclusion: the leaders were happy, Stevens was happy and the negotiating team was happy. It seemed to him to be a fair way to dispose of the concerns raised by some of the employees at the June 30 meeting that an advisory vote of the leaders be taken. McCarthy testified that he told the assembled employees that if, as a result of the advisory vote, the leaders were sympathetic to union representation, the UAW would try to accommodate them, and he suggested that one possible means of accommodation would be to negotiate them back into the unit.

I. 1996 Preaffiliation Vote Negotiations— July 1 to 9

1. July 1 negotiating session

A negotiation session was held on July 1, and the draft of a proposed contract was discussed. Article I of this proposed contract was a recognition clause which read as follows:

> The Company recognizes and acknowledges that the Committee is the exclusive representative in collective bargaining with the Company for all full-time production and maintenance employees, excluding clerical employees, temporary and part-time employees, professional employees, sales personnel, guards and supervisors *(including employees in the position of "leader")* as defined in the National Labor Relations Act. [Emphasis added.]

From this language it is clear that as of July 1, the parties were still in agreement that leaders were excluded from the bargaining unit. Sometime after July 1, Stevens consulted with counsel and made the decision that his prior decision to exclude the leaders was improper. Stevens testified that he communicated his changed position to the negotiating team, but the negotiating team stood firm in its position that the leaders were out of the unit.

2. July 3 letter

Respondent and the UAW engaged in a preaffiliation election campaign which included letters to employees. In a letter dated July 3, Stevens wrote:

> *A Change in Relationship?*
>
> Cold Heading and your elected committee seek to maintain an individual relationship with each and every employee based on an inherent respect for each person as an individual. While we are sure that every decision that has been made has not met with the approval of every employee, we have mutually tried, and will continue to try, to do our best to be fair and objective. . . .
>
> *A Change in Wages and Working Conditions?*
>
> One question which each of you must answer in making your decision is: Will the selection of the UAW benefit me? The UAW *does not* create the profits necessary to pay for wages and benefits or to provide good working conditions. Therefore, better wages, benefits and working conditions can never be achieved through affiliation with the UAW—especially, in a cost-driven and highly competitive industry like ours. Such

[5] Respondent does not dispute that employees had adequate notice of the election.

> things are only achieved through your individual skills and initiative, and through the combined efforts of each person employed by Cold Heading. The wages, wage increases, good benefits and excellent working conditions that you already have were not achieved through the efforts of the UAW; but rather, by the efforts of everyone employed by Cold Heading [emphasis in the original].
>
> *A Final Word*
>
> As we have previously stated, the UAW has nothing worthwhile or constructive to offer either you or Cold Heading.

3. July 8 ratification vote

A fourth ratification vote was scheduled for July 8. In a letter dated July 3, McCarthy wrote to employees advising them that if the contract was ratified on July 8, the Committee and the UAW would be bound by the ratified contract and precluded from bargaining for the three year term of the agreement. The employees again failed to ratify the agreement on July 8.

4. July 9 memo

In a memo dated July 9 addressed to "all contract employees and leaders," Stevens wrote, in relevant part, "in our opinion, the introduction of the United Auto Workers will seriously jeopardize our future survival and success."

J. Alleged Threats by Committeeman Lou Dimech

Kirk Gidcumb testified that sometime prior to July 10, he was approached at his machine by Dimech. Dimech asked Gidcumb if he had attended any of the UAW meetings. Gidcumb said no. Dimech asked why and Gidcumb said because he had no reason to go. According to Gidcumb, Dimech told him that he should go because if he didn't vote for the UAW he would be out of a job. Styma responded that he did not agree and told Dimech to leave him alone.

Dennis Styma testified that sometime prior to July 10, he was walking to the toolroom when he was approached by Dimech. Dimech told Styma that a UAW representative had told him that anyone who didn't support affiliation could be out of a job.

Dimech admitted speaking to both Gidcumb and Styma, but denied the statements attributed to him. According to Dimech, he told Gidcumb, 2 or 3 weeks before the election, that Gidcumb should come to the Sunday meetings and that Gidcumb could vote whatever way he wanted to. He told Styma a week before the election that he could vote whatever way he wanted to, the decision was up to each individual person and that the affiliation had no power to control anybody.

K. July 10—The Affiliation Election

1. The voting area

On July 10, an affiliation election was conducted on the second floor of Eagle's Hall. The UAW retained the services of Barry Goldman, an arbitrator, to serve as a witness to the election and to tabulate the results. Facknitz, Serio, Stern, and Bartell served as employee observers. The second floor room was 75 feet long and 40 feet wide. There was a slightly raised platform in the front of the room, called the stage area, where two tables were placed side by side. On each of these tables was a ballot box for nonleader employees. Chairs were positioned behind these tables for the arbitrator and the four observers. Perpendicular to the stage area tables were three long rows of tables. To the left of the stage area (if one were facing the stage), a separate ballot box was placed on a table which was designated as the leader box. To the right of the stage area was a storage area. A diagram of the room showed that in addition to the stage tables and the three elongated rows of tables, there were two tables on the left side of the room, a bar area with a flat surface on the left side of the room, four tables on the right side of the room, and two restrooms with doors which could be accessed from inside the room.

McCarthy arrived at Eagle's Hall at about 1:30 p.m. He brought paper ballots, ballot boxes, and pencils. He did not bring, nor did he construct, a voting booth. He told the observers that once a ballot was cast, only the arbitrator could thereafter touch it. He told them to maintain order around the ballot boxes so that the arbitrator would be in a position at all times to see that only one ballot was issued per person. He told the observers to give the voters an opportunity to vote in secret. He did not ask the observers to remove their personal hats, pins or any other type of paraphernalia, and there is evidence that several of the observers wore pro UAW hats and/or pins.

2. Allegations of electioneering and UAW presence throughout the voting period

Kampf drove to Eagle's Hall from upstate New York with her four grandchildren to attend the election. She arrived between 1:30 and 2 p.m., and McCarthy was already there when she arrived. She testified that she did not bring nor did she distribute any literature that day, explaining that she was experienced enough in election proceedings to know not to electioneer near the polls. Prior to the beginning of the balloting, Kampf testified that she walked around the room and casually greeted the voters and talked about the weather. She denied asking any employee how he felt about affiliation or how he was going to vote, again explaining that it is too late on the day of an election to ask employees how they are going to vote.

McCarthy was aware that the arbitrator would not arrive until 2:30 or 3 p.m. due to a previous engagement, and by setting the start time of the voting at 2 p.m., he intentionally set aside time for a meeting with employees to answer questions. McCarthy circulated around the room and spoke to individual employees. He then addressed the employees waiting to vote as a group and told them that since Goldman was not expected for another 30 to 45 minutes, that they could have a question and answer session. The consensus of those assembled was that they wanted to vote and leave. McCarthy reiterated that leaders would vote separately from the nonleader employees.

McCarthy testified that at around 2 p.m., Michael Michniak, vice president of Local 417, came to Eagle's Hall and stayed for about 10 minutes. McCarthy testified that he had asked Michniak to bring him a file folder from the office. Michniak spoke to some of the committeemen and left before the voting began. McCarthy testified that he was certain that no one handed out UAW literature, but he acknowledged that literature may have been in the room "just sitting there."

Michniak testified that McCarthy asked him to stop by Eagle's Hall and that he arrived around 2 p.m. He did not mention that he dropped off a file folder from the office. He walked around, introduced himself, asked voters their names, and shook their hands. Michniak denied that he asked any voter how he was going to vote. He explained that he has been involved in a number of organizing drives and he knows that he should not ask employees how they are going to vote. Michniak also denied ever hearing anyone else ask employees how they were going to vote, and he did not recall Kampf being present that day. He did not distribute, nor did he observe anyone else distribute literature. Michniak testified that he stayed about 30 to 45 minutes, and left when Goldman arrived.

Dennis Styma, a rollerman in the bolt plant, testified that he arrived at 2:45 p.m. and the voting had not yet started. He testified that he was approached by McCarthy and Kampf who identified themselves and tried to hand him pro-UAW literature.

Kirk Gidcumb, a rollerman in the bolt plant, testified that he arrived between 2:15 and 2:30 p.m. and was standing with three other employees, including Michael Holcomb, when Kampf approached the group, identified herself as from the UAW, and handed to Gidcumb pro-UAW literature which he accepted. Kampf asked Gidcumb how he was going to vote and Gidcumb said that was his choice.

Michael Holcomb, a rollerman in the bolt plant, testified that he was approached by Michniak and Kampf. Michniak introduced himself and wanted to know how the group was going to vote. He spoke about the UAW and the positive things the union could do for them. Holcomb observed Michniak passing out literature. He tried to hand literature to Holcomb but he did not accept it. Kampf also asked the members of the group how they were going to vote.

Facknitz testified that he did not recall Michniak being present that day, and he did not observe McCarthy or Kampf speaking to employees. He did not observe anyone handing out UAW literature.

When the voting started at around 3 p.m., McCarthy testified that he and Kampf took seats in the back of the room. Stern objected to their presence in the room during the voting, but his objection was overruled. McCarthy and Kampf remained in the room until the voting session ended at 7 p.m. McCarthy testified that he was too far away from the stage area to observe how the balloting was being conducted or to hear anything that was said.

3. The secret-ballot issue

The voting began at approximately 2:45 p.m., and the employees lined up to vote. Each employee was identified and signed a voter list. Leaders signed a separate list. The ballots were kept on the stage tables and handed out by Facknitz and Serio. Facknitz testified that as he handed out the ballots, he told each voter to vote in private and pointed in the direction of the tables lining the sides of the room. He told the nonleaders to place their ballots in one of the two ballot boxes on the stage, and he told the leaders to put their ballots in the leader box to the left of the stage. He denied ever telling anyone that he already knew how they were going to vote and that they should just vote at the stage tables in front of the observers.

Bartell testified that he openly opposed affiliation with the UAW, and he often wore a hat to work that said "No UAW." On July 10, Goss asked Bartell to serve as an observer at the election and Bartell agreed. Bartell testified that 95 percent of the voters were told by one or more of the observers that they could vote in private at one of the tables in the room, and that they did not have to vote at the stage tables. However, Bartell testified that Facknitz stated about a half dozen times that he knew how an employee was going to vote and that the employee didn't have to go to another table, he could vote right at the stage tables and drop the ballot in the box. Bartell did not remember if Serio made a similar statement to anyone and he testified that Stern did not make such a statement.

Styma testified that during the five minute period while he was waiting on line to vote, he heard Serio comment two or three times that voters did not have to go off to the side and vote because he knew how they were going to vote anyway. Holcomb testified that he also heard these comments by Serio which were stated in a loud voice, but addressed, in his opinion, to no one voter in particular. Holcomb also heard Facknitz make similar comments a couple of times.

Gidcumb testified that he did not hear any comments made to voters, but pointed out that he has profound hearing loss in both ears.

William Stoneburg, a header setup man, testified that he heard observers state to voters that they knew how they were going to vote and they didn't have to hide it, they could vote right in front of the observers.

Gregory Weirauch, a header setup man, testified that he heard an observer say more than once, "we know how you're going to vote, you don't have to hide it." Weirauch did not know which observer said this. He also testified that Facknitz handed him his ballot and told him to vote wherever he wanted.

Lou Dimech, who served as a substitute observer for Facknitz during several periods when Facknitz left the room, was not asked if he heard any comments made to voters.

Audey Stern testified that he was opposed to affiliation, that his views were well known, and that he was asked to serve as an observer for the "union opposed" faction of the negotiating team. Stern's testimony was very similar to Bartel's. Stern testified that 95 percent of the voters were told they could go elsewhere to mark their ballots, and that he heard Facknitz comment about a half dozen times that the employee could vote right in front of the observers. According to Stern, Facknitz made these comments in a sarcastic, joking manner. Stern recalled one voter in particular being told by Facknitz, "we know you're for us," and the employee responded, "damn straight I am" and marked the "yes" box on his ballot in front of the observers. Stern recalled this voter because he had gotten into an argument with him several days before the election. Stern could not describe the other five voters to whom Facknitz allegedly made similar comments. Stern admitted on cross-examination that although he was aware that the arbitrator was present to supervise the election and to see that the balloting was conducted fairly, he did not register any complaint with the arbitrator regarding Facknitz' remarks.

Serio testified that he served as a "pro UAW" observer, and that he stated to approximately 10 to 15 employees that he knew how they were going to vote and they could vote right in front of him. He testified Facknitz made the same comment a couple of times. When asked why he made these comments, Serio testified, "Because I wanted the affiliation to win."

4. Facknitz' alleged distribution of hats

Facknitz testified that he brought a box of UAW hats to Eagle's Hall and placed the box on top of the bar. He wore a UAW hat throughout the day, but he could not recall on cross-examination if he gave anyone else a hat. He specifically denied giving a hat to employee Sam Oliver during the voting period.

McCarthy testified at first that he did not see Facknitz bring in a box of hats, nor did he see him distribute any hats. He later testified, however, that Facknitz did bring in a box of hats and gave out one hat, midway through the voting, to Sam Oliver who was sitting at one of the tables.

Bartell testified that he saw Facknitz give one employee a hat while the employee was waiting on line to vote. Stern testified that he saw Facknitz, while seated in his observer chair, reach across the stage tables and hand Sam Oliver a hat. Holcomb and Serio testified they saw Facknitz give a hat to Sam Oliver who was seated at one of the tables.

William Stoneburg, a header setup man, and Weirauch testified that they saw Facknitz handing out hats prior to the start of the voting.

5. The counting of the ballots

McCarthy and Facknitz testified that the leader ballots were counted first, whereas Serio, Stern, and Bartell testified that the nonleader ballots were counted first. Serio and Bartell testified that when the first ballot box was opened, 15 to 20 ballots fell on the floor. Serio testified that as far as he knew, all of the ballots got back onto the table and were counted, but Bartell testified that he believed there was a missing nonleader ballot. On cross-examination, Bartell conceded that a misnumbering had occurred on the sign in sheets and in fact, there was no missing ballot.

After the ballots were counted by arbitrator Goldman, he prepared a tally sheet which was signed by himself, Serio, Facknitz, Stern, and Bartell. The document read in relevant part:

> The undersigned was present on Wednesday, July 10, 1996 at Warren Eagles Hall on Hoover & 9 Mile Rd between 2:45 and 7 p.m. to observe the election regarding affiliation of the Cold Heading Independent Union with the UAW.
>
> No irregularities were observed in the balloting. Separate counts were tallied for leaders and hourly workers.
>
> The final counts were as follows.
>
> LEADERS
> Yes—2 No–23
> HOURLY WORKERS
> Yes—81 No–78

Serio testified that he signed the tally sheet, but he did not read it before he signed it because he was for affiliation, and he would have signed it even though there were irregularities in the election. Stern testified that he also signed the sheet without reading it because he was "too pissed off" when he realized affiliation had passed. Bartell testified that he read the sheet and signed it even though he did not agree with it.

L. Postaffiliation Election Bargaining—July 11 to August 2

Respondent refused to recognize the results of the affiliation election and maintained its position that the Committee, and not the Committee as affiliated with the UAW, remained the exclusive bargaining representative of employees. Stevens informed employees of his position at the start of the July 11 day shift at 5 a.m. According to Simpson, Stevens stated that he would not recognize the affiliation because it was not Board certified and because not all the employees had a chance to participate in the vote. According to Simpson, Stevens also stated that he was not going to let any one of the employees "run the company off a fucking cliff" and that he felt that two committeeman had a grudge against the Company.

McCarthy met with some members of the negotiating team, and it was determined that the team should continue to negotiate with Respondent and reach a collective-bargaining agreement. McCarthy testified that because it could not be predicted how long it would take to resolve the legal issue of affiliation, it seemed the fair and politically correct move for the negotiating team to reach an agreement and to recommend its ratification.

The negotiating team and Respondent participated in several more bargaining sessions, and an agreement was reached. The terms of the contract were submitted to a ratification vote on August 1, ratification was approved and the agreement was signed on August 2.

Prior to reaching final agreement, Stevens stated in negotiations that he wanted the leaders back in the unit. The negotiating team insisted that they remain out of the unit. Both sides were resolute in their positions. In the final version of the collective-bargaining agreement, all references to leaders were deleted. They were not specifically included or excluded in the recognition clause, and all references to leader premium pay were omitted.

M. Relocation of Equipment from Warren to Hudson

Respondent operates 16 Formax headers at its Warren facility. Cecil testified that he initially purchased Formax headers to manufacture small bolts, and Formax headers to manufacture large bolts, but he intentionally did not purchase Formax headers to manufacture medium-sized bolts as he hoped that the other headers could be formatted to produce the medium-size product. After operating this way for some time, Cecil realized that this approach was not economical, and in February 1996 he ordered two Formax headers, at a price of $800,000 each, to make medium-sized bolts. It was Cecil's intent that these machines be installed in the Warren bolt plant, and in preparation for their installation two areas of concrete flooring were poured in the bolt plant. At the time the machines were ordered in February, 30 percent of the purchase price was paid, and Cecil expected to take delivery within 6 to 8 months.

Cecil testified that he knew from the outset that there would have to be additional electrical power brought into the Warren bolt plant to operate the two new Formax headers. He was confident that he could operate the machines in the Warren plant because he had experienced this situation before and had solved the problem by installing a new transformer. Cecil testified, "I wasn't that concerned. I knew we needed this equipment, I had no other place to put it and there was a space we'd cleared for it." Cecil was also aware that the cost of transporting the two machines from the manufacturer was $150,000 over the purchase price, and that if for any reason the machines had to relocated after delivery and installation, it would cost an additional $150,000.

According to Stevens, sometime in June, after the Formax headers were ordered and the concrete pads were poured, Ken Stokle, an electrical manager employed by Respondent, performed a study and concluded that the Warren bolt plant did not have the capacity to power the new machines. Stevens professed to be surprised and embarrassed by the results of Stokle's study. Stevens testimony was directly contradicted by Cecil who testified that Stokle's study may well have been performed before the concrete pads were poured, and that regardless of when it was performed, he was not at all surprised by the results.

On or about July 16 or 17, Stevens made the decision to route delivery of the two new Formax headers to the Hudson facility. Stevens testified that he made this decision for two reasons: first, because of the unexpected lack of electrical capacity in the Warren bolt plant, and second, because of the termination of a subcontracting relationship between Respondent and a minority subcontractor, Detroit Heading Company (Detroit Heading).

In or about 1990, Respondent was allegedly under pressure from the big three auto makers to have contracts with minority business enterprises. Tom Sims was a supervisor of Respondent's, and the decision was made to assist Sims in establishing a minority-owned bolt manufacturing company. Detroit Heading was established and Tom Sims and his wife owned 51 percent of the Company and Respondent owned 49 percent. Cecil became vice president of Detroit Heading and a member of its executive committee. Respondent leased equipment to Detroit Heading, and physically stored the raw materials needed by Detroit Heading to produce bolts. Annually, Detroit Heading derived about $3 million in income from Respondent, which represented about 5 percent of Respondent's business.

Cecil testified that from the very beginning of the relationship between Respondent and Detroit Heading, there was concern on the part of Respondent about Detroit Heading's profitability. Costs were not contained and a large amount of debt accumulated. Cecil testified that Detroit Heading had inventory problems and there was uncertainty as to whether the parts manufactured by Detroit Heading were saleable. Cecil did not testify whether Respondent's concern about the quality of the parts manufactured by Detroit Heading persisted after 1990. If they did, it apparently had no impact on Respondent as it continued to do business with Detroit Heading.

In late 1995, Cecil and Stevens met with Sims and asked him to control costs and begin to pay down the debt. Sims was allegedly not receptive to these suggestions, and at a subsequent meeting, both sides agreed that they would look to buy each other out. According to Cecil, in June 1996 Detroit Heading found a prospective buyer for Respondent's 49-percent interest, and Cecil was terminated as vice president and withdrew from the executive committee.

Cecil testified that as a result of the deterioration of the relationship with Detroit Heading, Detroit Heading could no longer produce bolts for Respondent, and the result was "chaos." Cecil was specifically asked when Detroit Heading last did work for Respondent, and he testified that there was not an immediate shut off of production, and that Detroit Heading continued to produce parts for Respondent even after the sale of Respondent's interest. In fact, Cecil testified, "I'm quite sure they're still making parts for us, a small amount." Later in his testimony, Cecil reversed course and said that Detroit Heading was not producing parts anymore for Respondent, and that it last manufactured parts for Respondent in May or June 1996.

Cecil testified that he and Stevens talked about alternatives to using Detroit Heading, including adding to the Warren facility and looking at nearby properties. Cecil ordered new machines and aggressively sought to procure a new facility to put them in. Respondent hired a company to do research on sites, tax abatements, energy costs and area wage rates. Cecil, Stevens, and Stevens' father visited a number of sites, and in June 1996, they decided that Hudson was an ideal location to open a new plant. An offer was made to purchase the property on July 16 or 17, and the deal was closed in early August.

Equipment was moved out of the Warren facility and sent to the Hudson facility: a #30 thread roller, an FX34 header, a #20 thread roller, an FX53L header, a Saspi GV-3/20 and an FXT-E thread roller. Cecil estimated the value of the transferred equipment between $785,000 and $895,000. The decision to transfer these machines was made on or about July 16 or 17. At the same time, the decision was made to route delivery of the two new Formax headers to the Hudson facility.

At the time of the hearing, the Hudson facility was operational. Cecil testified that his business plan for Hudson was to manufacture lower-quality products that are easier to manufacture and sell for less money. Cecil explained that the employees in Hudson are not unionized and their wage and benefit rates are lower than the rates in Warren. On the other hand, the Warren work force is experienced, relatively high paid and capable of producing premium products which sell at a higher profit margin. Two weeks prior to the hearing, Cecil testified he took delivery of a new pointer machine at the STG plant in Warren. A co-generations unit was in the process of being installed in Warren, and he expected delivery within a week or two of a new thread roller for the Warren bolt plant. Assembly machines were also targeted to be built and installed in the Warren bolt plant.

N. Bargaining over the Relocation of Equipment

On August 7, Stevens met with the negotiating committee and informed the committee that a decision had been made to open the Hudson facility. According to Stevens, he explained that the majority of the equipment in the Hudson facility would

be new, but that some of the equipment would be removed from the Warren facility and relocated to the Hudson facility.

According to Facknitz, the issue of what was going to happen to the Warren facility's work force as a result of machinery being moved to the Hudson facility was discussed at the August 7 bargaining session. Stevens said there could be layoffs, but he would try to keep them at a minimum. According to Facknitz, when he left Respondent's employ in late September no machinery had yet been moved.

According to Galvan, Stevens said he had bought a new building in Hudson, that he was going to be starting a new company down there and that he was going to be moving some of the Warren machinery to Hudson. He also recalled Stevens stating that he was going to be bringing in new machinery to the Warren facility and that there would be minimal layoffs in seniority order. Galvan testified that one employee, Terry Thomas, lost his job as a result of the transfer of the equipment, and several meetings were held between the negotiating committee and Respondent to discuss Thomas' termination.

According to Cecil, the higher-priced work at the Warren facility has replaced the work that was sent to Hudson, that the employees at the Warren facility continue to work considerable overtime, and there has been no adverse impact on the employees in the Warren facility.

IV. ANALYSIS

A. The Scope of the Bargaining Unit and its Effect on the Affiliation Election Result

The General Counsel contends that a majority of the ballots cast on July 10 were cast in favor of affiliation between the Committee and the UAW. The underpinning of the General Counsel's argument is that in the course of negotiations prior to July 10, the parties had reached a final agreement to exclude the leaders from the bargaining unit. Since the leaders were excluded from the bargaining unit as of July 10, the General Counsel argues they were ineligible to vote in the affiliation election, and therefore a majority of the ballots were cast in favor of affiliation by a vote of 81 to 78. Respondent argues that the leaders were part of the bargaining unit on July 10, that the leader ballots should be counted, and that affiliation was defeated by a vote of 101 to 83. I find merit in Respondent's argument for the reasons set forth herein, and I find that a majority of ballots were cast against affiliation. Therefore, Respondent's continued recognition of the Committee as the exclusive collective-bargaining representative of its employees was proper.

It is well settled that the scope of the bargaining unit, as to inclusion or exclusion of a group of employees, is a permissive subject of bargaining over which parties may bargain if they so choose. *Ginko, Inc.,* 317 NLRB 80 (1995); *Idaho Statesman,* 281 NLRB 272, 275 (1986), enfd. 836 F.2d 1396 (D.C. Cir. 1988). In this case, the evidence establishes that for over 20 years the leaders were part of the collective-bargaining unit represented by the Committee. On April 3, during negotiations, the parties reached tentative agreement on a recognition clause which did not alter the historical scope of the unit, and it was not until after May 10 that changing the scope of the unit was first discussed. I make this finding based on the credible testimony of Javier Galvan who specifically recalled that the issue was first raised in negotiations after the first ratification vote. I further credit the testimony of Facknitz and Galvan that when the issue of the leaders was raised by the committeemen after May 10, Stevens was adamant that the leaders were to be excluded because he felt they were "management," and the committeemen did not take exception. McCarthy credibly testified that he had been told by members of the negotiating team that Stevens did not want the leaders in the unit and neither did they. McCarthy's testimony establishes that as of May 29, 2 days before the expiration of the contract, both sides were in agreement that the leaders were excluded from the bargaining unit.

The parties remained in agreement on the scope of the bargaining unit until after the affiliation election on July 10. Stevens could not recall during his testimony when he changed position with respect to the leaders, and could say only that it occurred sometime after July 1. Facknitz, on the other hand, clearly recalled that Stevens did not reintroduce the issue of leaders until after July 10 when Stevens stated that he had made a mistake and he wanted the leaders back in the unit, and I credit Facknitz on this point. The Committee held fast to its position that the leaders should be excluded. Of course, by that time, it was clear to all that if the leaders were part of the bargaining unit, affiliation was defeated, and if the leaders were not part of the bargaining unit, affiliation was approved. Understandably then, after July 10, both sides remained obdurate in their respective positions, and when the final collective-bargaining agreement was signed on August 2, there was no agreement to alter the scope of the historical bargaining unit which included leaders. The language agreed to on July 1, which excluded leaders as supervisors, was deleted from the final contract language.

The Board recognizes that in the normal course of negotiations, there is much give and take until a final collective-bargaining agreement is reached. Frequently, agreement may be reached on some issues, only to be modified as other issues come into play. Consequently, the Board has adopted the view that tentative agreements made during the course of contract negotiations are not final and binding. *Taylor Warehouse Corp.,* 314 NLRB 516, 517 (1994), enfd. 98 F.3d 892 (6th Cir. 1996). Parties negotiating for a contract always have the ability to make any provisions final and binding along the way, thus precluding any further negotiations on those issues, but there must be some evidence that the parties intended the provision to be final and binding. Absent such evidence, no agreement becomes final and binding until the final contract, in its entirety, is reached. *Stroehmann Bakeries, Inc.,* 289 NLRB 1523, 1524 (1988).

The principles enunciated in *Taylor* and *Stroehmann* are directly applicable here. The issue of leaders was discussed repeatedly during the 1996 negotiations, even after the April 3 recognition clause was initialed. The issue was clearly not off the table at any time, and I find that McCarthy was cognizant of this fact. He testified that even though he believed the leaders to be excluded from the bargaining unit, he and the legal department of the UAW determined that leaders should be allowed to vote separately to ascertain whether the leaders were

sympathetic to the notion of UAW representation. In the event that affiliation won in the leader group, McCarthy testified that it was his intention that the UAW would advance bargaining proposals to put them back into the unit. At the June 30 meeting, McCarthy told the assembled employees that if the leaders were sympathetic to union representation, the UAW would try to accommodate them, and he suggested that one possible means of accommodation would be to negotiate them back into the unit. Three days later, on July 3, McCarthy addressed a letter to employees imploring them not to ratify the contract in the upcoming ratification vote, because to do so would bind the employees to the terms of the contract for 3 years. McCarthy emphasized, "We [the UAW] would rather have a chance to bargain *immediately* after you vote to join the UAW on July 10, 1996" (emphasis in the original). There is no doubt that McCarthy understood that until a final agreement was signed, all issues were still on the bargaining table and he publicly expressed his intent to reintroduce the scope of the bargaining unit as an issue in negotiations if the vote amongst the leaders was favorable to affiliation.

The General Counsel argues in her brief that a final and binding agreement had been reached to exclude the leaders prior to July 10, and points to three facts to support the argument: first, that Stevens told the negotiating team they were not bargaining for the leaders; second, that he unilaterally gave the leaders a 50-cent-per-hour increase in June; and third, that leaders did not vote in any of the ratification votes. I disagree. While it is true that in May and June, Stevens took the position that the negotiating team was not bargaining for the leaders, it is also true that in July he took opposite position. Had a final agreement on the scope of the agreement been reached prior to July 10, Respondent's attempt to renegotiate the issue after July 10 would have constituted bad faith bargaining and an unfair labor practice. General Counsel does not make this argument. The unilateral granting of a raise to the leaders in June was Respondent's attempt to obtain a tactical advantage in negotiations and is hardly evidence of a *mutual* agreement to change the scope of the bargaining unit. The General Counsel might well have argued that this unilateral act by Respondent also constituted an unfair labor practice, but did not. Finally, the evidence is equivocal regarding leaders participation in the ratification votes.

Inasmuch as the parties never reached a final and binding agreement to alter the scope of the bargaining unit, the leaders, as members of the unit, were eligible to vote in the affiliation election on July 10. A majority of the ballots were therefore cast against affiliation, and Respondent's refusal to recognize and bargain with the Committee, as affiliated with the UAW, did not violate the Act.

B. The Affiliation Election

If my finding that a majority of employees voted against affiliation is ultimately adopted, it is unnecessary to address Respondent's remaining challenges to the conduct of the affiliation election. However, if this finding is not adopted, and the Board concludes that a majority of the ballots was cast in favor of affiliation, Respondent's arguments must be addressed.

Affiliation is essentially an internal union matter, and the Board interjects itself in very limited circumstances. Only where an affiliation vote is conducted with less than adequate due process safeguards, or where the organizational changes are so dramatic that the postaffiliation union lacks substantial continuity with the preaffiliation union will the Board find the employer's duty to bargain does not continue. The burden is on the party seeking to avoid its bargaining obligation to demonstrate that the change was not accomplished with minimal due process, or was sufficient to raise a question concerning representation. *Sullivan Bros. Printers,* 317 NLRB 561 (1995). Respondent has failed to meet that burden.

1. The due-process argument

Under the due-process prong of the *Sullivan* test, Respondent raises five procedural challenges: first, that employees were not afforded the opportunity to cast a secret ballot; second, that Facknitz and Serio intimidated voters by wearing pro-UAW paraphernalia and by distributing UAW hats; third, that McCarthy, Kampf, and Michniak engaged in electioneering prior to the commencement of the voting; fourth, that McCarthy and Kampf remained in the polling area throughout the voting period; and fifth, that Dimech's presence as an observer coerced employees.

In challenging the secrecy of the balloting, Respondent asserts first, that employees were compelled by the physical layout of the room to cast their votes in public, and second, that employees were coerced to vote in public as a result of statements made by the pro-UAW observers. The evidence does not support either assertion.

The voting took place in a large room which was 75 feet long and 40 feet wide. Three rows of tables ran the length of the room, two tables and a flat-surfaced bar area were located on the left side of the room, and four tables were located on the right side of the room. All of these tables and surfaces were available for employees to walk to, lean on, and mark their ballots out of the presence of others. In addition, Respondent's diagram shows that there were two restrooms with doors which were accessible from inside the room and which employees were free to enter and vote in complete seclusion. It is clear that all employees were afforded the opportunity to vote in private.

It was not required, as Respondent suggests, that the UAW provide a voting booth. The failure to provide a voting booth or some other mechanism to assure secrecy of ballots will not be found to invalidate an affiliation vote in the absence of any evidence that individuals observed others voting or that ballots were tampered with. *Sullivan Bros.,* supra at 563 fn. 5, citing *Hammond Publishers,* 286 NLRB 49, 51 (1987). In this case, only one witness, Audey Stern, testified that he saw how a voter marked his ballot, and I thoroughly discredit this testimony. Stern was openly opposed to the affiliation movement and he blatantly attempted to curry favor with Respondent during his testimony. Stern felt so strongly about testifying in favor of Respondent, that he volunteered to testify, declined Respondent's attempted service of a subpoena, and declined Respondent's offer of witness fees. While testifying, he appeared tense, angry, agitated and he was argumentative on cross ex-

amination. In short, I found his testimony completely unreliable.

Nor do I find that the statements attributed to Facknitz and Serio, the pro-UAW observers, served to coerce employees to cast their vote in front of others. Bartell, Styma, Holcomb, Stoneburg, Weirauch, and Stern all testified that they heard either Facknitz or Serio make repeated statements that employees did not have to "hide" their votes. Facknitz denied making any such statements, but Serio admitted to making the statements. I must, therefore, resolve the clear conflict in credibility on this issue. I was impressed by the testimony of Styma and Stoneburg. Both witnesses were calm, even-tempered and respectful in their demeanor, and, unlike Stern, did not appear to be influenced by the fact that they continue to work for Respondent. Styma credibly testified that while he was waiting on line to vote, he heard Serio comment two or three times that voters did not have to go off to the side and vote because he knew how they were going to vote anyway. Stoneburg testified that he heard "observers" state to voters that they knew how they were going to vote and they didn't have to hide their votes.

I am led to conclude, based on Styma and Stoneburg's credible testimony, and based on the admissions of Serio, that Facknitz and Serio did, in fact, make the comments alleged. Although Facknitz denied making these statements, I discredit him on this limited point. Facknitz was an impressive witness for the General Counsel who possessed excellent recall. He also made appropriate concessions on cross-examination which I found enhanced his overall honest demeanor. However, Facknitz had spearheaded the affiliation movement, and I conclude that youthful enthusiasm clouded his better judgment on the day of the election. That these comments were made does not alter my finding that all voters were afforded the opportunity to mark their ballots in private, and that there is no credible evidence that anyone observed how anyone else voted. I therefore find it irrelevant that Facknitz and Serio made these statements since the *Sullivan* standard regarding ballot secrecy was otherwise satisfied.

Respondent's remaining four procedural challenges are equally meritless. The evidence shows and I find that observers and voters wore pro- and anti-affiliation paraphernalia during the election. I also find, based on the testimony of McCarthy, that Facknitz did distribute at least one UAW hat during the election. The evidence also establishes, and I find, that McCarthy, Kampf, and Michniak engaged in electioneering prior to the commencement of the voting, shook hands with employees, asked them how they were going to vote, and handed out union literature. McCarthy and Kampf also remained in the room for the entire voting period. I am unpersuaded that any of these acts, singly or collectively, served to deny voters their right to due process. Finally, I credit the testimony of Styma and Gidcumb that prior to the affiliation vote, Lou Dimech, a committeeman who served as a relief observer during the election, told them that if they did not vote in favor of affiliation, they would be out of a job. Both of these witnesses were credible on this point. Once again, however, these statements did not, in my opinion, deny Styma or Gidcumb, or any other voter, their right to due process, and that is all the law requires.

The Board's approach in these cases is to analyze the totality of circumstances in order to give paramount effect to employees' desires. I find that the affiliation election was accomplished with at least minimally adequate due process. Respondent acknowledges that employees were given adequate notice and sufficient opportunity to discuss affiliation prior to the vote. Every voter was identified and signed a registration list. Only one ballot was given to each voter, and every ballot was accounted for at the conclusion of the voting. Every employee was given the opportunity to vote in private, and placed their marked ballots in a sealed box. All of the election observers, both pro- and anti-affiliation, signed a certification prepared by a neutral arbitrator that the election was fairly conducted. I find the Board's standard of minimal due process was satisfied.

2. The discontinuity argument

Respondent did not recognize the affiliation between the Committee and the UAW and the evidence establishes that the Committee continued to represent Respondent's employees exactly as it had prior to the affiliation election. The General Counsel correctly points out in her brief that after the affiliation vote, the composition of the negotiating team remained the same as prior to the affiliation. No titles or duties were changed. There were no changes in the frequency or content of the committeemen's meetings. As before, committeemen still handled day-to-day employee problems. There was no change in the ratification procedure, and the Committee's limited assets were left undisturbed. Even the file cabinet stayed in the same place.

It is something of an anomaly to argue, as Respondent does, that if it had recognized the affiliation between the Committee and the UAW, there would have been a lack of substantial continuity between the pre and post affiliation representatives. The only witness who testified on this point was McCarthy, and his testimony was hardly supportive of Respondent's position. Respondent had the burden of establishing discontinuity between the pre- and post-affiliation representative, and it failed to do so.

C. The 8(a)(1) Allegations

The complaint alleges six separate violations of Section 8(a)(1) committed by Respondent between February and July 1996. For the reasons set forth herei I find merit to all of these allegations.

1. February/March 1996

Javier Galvan testified that sometime in February, he was called into Dave Goss' office with another employee and threatened with a rather indelicate physical consequence if they continued trying to organize the UAW. Galvan was a credible witness, and, like Facknitz, I was impressed by his respectful demeanor not only on direct examination, but on cross examination as well. Goss, in comparison, was rather cavalier when he testified that he told Galvan that if he owned Cold Heading and the UAW came in, he would put a "lock on the fucking doors." I therefore credit Galvan's version of this conversation, and I find that Goss' statement that if employees persisted in trying to organize the UAW they would be "fucked in the ass" constituted a threat in violation of Section 8(a)(1). Goss' further

statements that jobs were going to be lost and that the Stevens family might close the shop also constituted threats in violation of Section 8(a)(1).

Respondent argues in his brief that Goss' statements, even if found to have been made, were made outside the 10(b) period. The initial charge was filed in this case on July 19. The 10(b) period therefore began on January 19. Both Galvan and Goss testified that the conversation occurred no earlier than February, and the Respondent's 10(b) argument is plainly without merit.

2. June 24 at 11 a.m.

June 24 was a bad day for Derek Stevens. The evidence establishes that by 11 a.m. on the morning of June 24, Stevens was aware of two things: first, that a meeting of employees had been held the day before and, second, that there was talk of a union. Facknitz credibly testified that he was told by Greg Heiser, a department manager, that Heiser had seen NLRB literature which had been set out on tables earlier that morning. Heiser told Facknitz that he had called Stevens and told him that he better get over to the bolt plant because something was going on with the union. Heiser was called by Respondent as a witness, but he was not asked about this conversation with Facknitz. Facknitz' testimony was not only uncontradicted, but I draw an adverse inference from the fact that Heiser was not questioned by Respondent about this conversation when he was clearly available to do so. *GATX Logistics, Inc.,* 323 NLRB 1, 4 fn. 9 (1997).

Facknitz' description of Stevens' demeanor during this conversation was particularly apt. Facknitz described Stevens as obviously shaken, nervous and upset. I had the opportunity to observe Stevens' demeanor on the witness stand and, like Facknitz, I too observed obvious and prolonged physical manifestations of nervousness, including perspiring, eye darting, and leg shaking. Stevens could never claim to have a poker face, and I have no doubt that Facknitz could easily discern Stevens' emotional state in the same way as those who witnessed his testimony at the hearing.

I specifically discredit Stevens' testimony that "sometime, somewhere" he may have interrogated Facknitz, but not on June 24 at 11 a.m. I also discredit Cecil when he testified that words similar to those attributed to Stevens by Facknitz might have been said, but he couldn't be sure of the date. Stevens and Cecil were deliberately vague about the date and time of this conversation in order to be able to deny specific knowledge of the affiliation activity prior to the 11:30 a.m. lunchroom meeting. They were also not telling the truth. I therefore find that it was at 11 a.m. that this conversation took place, as Facknitz and Simpson described, and that by asking Facknitz if there had been a meeting the day before, if petition cards had been signed, why did employees want a union, what did the employees think a union could do for them, and who was pushing the union, Stevens engaged in unlawful interrogation in violation of Section 8(a)(1) of the Act.

3. June 24 at 11:30 a.m.

Steven's emotional state obviously carried over to the 11:30 a.m. meeting in the bolt plant lunchroom. Again I credit the testimony of the General Counsel's witnesses, especially Facknitz and Simpson, who testified that Steven's asked the assembled employees, "who in the fuck had a problem," what did the employees think the UAW could do for them, and why did they want the UAW. I also find that Stevens threatened employees when he said if anybody didn't like their job or had a problem with working there, they were welcome to go elsewhere. I thoroughly discredit Stevens' testimony that this meeting was convened to discuss ratification issues. Especially ridiculous was Stevens' testimony that while he was discussing ratification with the employees, Galvan entered the room and mentioned an upcoming affiliation vote. Stevens testified that he had never heard the term affiliation before, did not know what Galvan meant, did not ask Galvan what he meant, and continued talking about ratification. Cecil, on the other hand, conveniently absented himself as a witness to Stevens' statements by stating that he had to take 10 minute call from Stevens' secretary who was distraught about receiving the letter from the UAW. Even if Cecil spoke to the secretary for ten minutes, as he claimed, he testified that he did not return to the lunchroom for the balance of what was at least a 20-minute meeting because there was a crowd of employees at the doorway and he did not want to push past them and be considered rude. Elmer Cecil was and is the executive vice president and it is an absurd proposition that he could not have said "excuse me" and resumed his place in the meeting. It is also unbelievable that Cecil never mentioned the UAW letter to Stevens when the meeting was over.

4. June 24 at 3 p.m.

Derek Stevens' attitude that day did not improve with time. At the 3 p.m. bargaining session, Stevens again threatened and interrogated the employee-members of the negotiating team. I credit Facknitz' testimony that Stevens stated that he did not want to run a company with a militant work force and that he was not going to bring any more machinery into a militant work force. I credit Galvan's testimony that Stevens stated that the union was not going to be able to do anything for the employees and that if they persisted in trying to bring in the UAW, a lot of families would be hurt. I credit Simpson's testimony that Stevens asked the committeemen why the employees wanted a union and said that there would be consequences if they affiliated with the union. Stevens admitted on the witness stand that he stated that bringing in the UAW would hurt families, and that he asked the committeemen why they wanted to affiliate with the UAW. He also admitted to making the statement, in question form, why would he bring new equipment into a militant environment.

5. July 3 letter

In a letter to employees dated July 3, Stevens wrote that better wages, benefits and working conditions "can never be achieved through affiliation with the UAW." I agree with the General Counsel that this statement was intended to convey to employees the futility of unionization and as such constituted an unlawful threat in violation of Section 8(a)(1). *Hedaya Bros., Inc.,* 277 NLRB 942, 957 (1985).

6. July 9 memo

In a memo to employees dated July 9, Stevens warned that the introduction of the UAW would "seriously jeopardize our future survival and success." I agree with the General Counsel that such a prediction of adverse consequences of unionization violates the Act. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617–619 (1969).

D. Relocation of Equipment

The General Counsel contends that the routing of the two Formax headers to the Hudson facility, and the removal and transfer of machinery from the Warren facility to the Hudson facility, violated Section 8(a)(3) and (5) of the Act. Specifically, the General Counsel argues that Respondent was motivated to route the Formax headers to the Hudson facility because the employees at the Warren facility had engaged in the protected activity of seeking affiliation with the UAW. The General Counsel relies on the statement made by Stevens during the 3 p.m. bargaining session on June 24 as direct evidence of the illegal motivation. The General Counsel further extrapolates from that statement, as well as the other statements of union animus made by Stevens, that the same illegal consideration motivated the decision to remove and transfer six other pieces of equipment from the Warren facility to the Hudson facility. Respondent argues that it presented ample, uncontradicted evidence that the relocation of all of the machinery was motivated by legitimate and substantial business reasons. I find that the evidence establishes the violations of the Act as alleged by the General Counsel.

Both sides agree that the Board's approach in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is applicable. The General Counsel is therefore required, in the first instance, to make a prima facie showing sufficient to support the inference that protected conduct was *a* motivating factor in the Respondent's decision to relocate machinery. An employer's statements, without more, may constitute direct evidence of illegal motivation sufficient to satisfy the animus and motive requirements for an 8(a)(3) violation. *Quality Control Electric,* 323 NLRB 1 (1997). If the General Counsel makes a prima facie showing, the employer has the burden to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Clearly Respondent's employees were engaged in protected activity when they participated in meetings to discuss the possible affiliation of the Committee with the UAW, and Respondent does not argue otherwise. Respondent's first position is that there is insufficient evidence of union animus. I disagree. Immediately on learning of the affiliation movement, Stevens' engaged in repeated threats and interrogations of employees regarding their support of affiliation on June 24. Although Stevens did state, at the three bargaining sessions, that he would recognize the affiliation if lawfully obligated to do so, he then proceeded unabashedly to further threaten and interrogate the employee-members of the negotiating team. He stated, in plain terms, that he would not bring new equipment into a "militant environment." After the affiliation vote on July 10, neither Stevens nor McCarthy nor the committeemen could be certain whether affiliation had passed or had been defeated. Confronted with the possibility that he would be bargaining in not too distant future with the UAW, Stevens continued to express his animus toward that possibility when he announced on July 11 that he was not going to let any one employee "run the company off a fucking cliff."

Unquestionably, the General Counsel established a prima facie showing under *Wright Line* that protected conduct was a motivating factor in the Respondent's decision to relocate equipment. Respondent maintains, however, that it satisfied its burden of demonstrating that the relocation would have taken place even in the absence of the protected conduct. Again, I disagree.

Respondent sets forth two business reasons for relocating the equipment. With respect to the two Formax headers, Stevens testified there was insufficient power in the Warren bolt plant to run the machines, and claimed to have been embarrassed by the realization that after he had committed $1.6 million of the company's assets to the purchase of these machines, he realized he couldn't plug them in. Unfortunately for Stevens, Cecil testified that the electrical problem had been anticipated by him and could easily have been solved, as it had been in the past, with the installation of a transformer. I further draw an adverse inference from Respondent's failure to call Ken Stokle, its electrical manager, to testify as to the results of his electrical study. Stokle was available to Respondent and presumably would have testified favorably for Respondent. The failure to call him leads me to infer that had he testified, his testimony would have been adverse to Respondent's position that it lacked sufficient electrical power to operate the two Formax headers. See *International Automated Machines,* supra at 1122.

The second business reason for relocating the equipment was the alleged termination of the subcontracting relationship with Detroit Heading which resulted in a five percent loss of manufacturing capacity for Respondent. The only evidence offered by Respondent to substantiate the second business justification was the testimony of Stevens and Cecil which I thoroughly discredit. How the loss of five percent of manufacturing capacity could result in "chaos" as Cecil described is puzzling. In fact, it is not clear that the relationship with Detroit Heading was *ever* terminated. Cecil testified, at one point, that that he was "quite sure" that Detroit Heading was, at the time of the hearing, still making parts for Respondent. A few minutes later, he was equally certain that Detroit Heading was not making parts for Respondent.

Even if I were to credit Steven's and Cecil's testimony, which I do not, it would appear that as early as 1995, Respondent knew that its relationship with Detroit Heading was coming to an end. If, in fact, Respondent undertook the steps outlined by Cecil to identify prospective sites to operate a new facility, including retaining a consultant to give advice with respect to tax abatements, energy costs and area wage rates, entering into a contract to purchase the property in Hudson and entering into a final purchase agreement, there must have been some documentation of these events. Indeed, when I asked Stevens if he had such documentation, he stated, "I have all that documentation back at the office." It would have been helpful if he had brought it to the hearing. Again, I draw an adverse in-

ference from Respondent's failure to provide the documentation and I infer that the documentation, if it exists, is unfavorable to Respondent's position. *Zapex Corp.,* 235 NLRB 1237, 1239 (1978).

Cecil at first testified that he needed the two new Formax headers to produce medium-sized bolts in Warren. He later testified that the reason Respondent routed the Formax headers to Hudson, and transferred six additional pieces of equipment from Warren to Hudson, was to produce low-end quality, cheaper products in Warren. Cecil did not explain why two state of the art pieces of equipment, valued at $1.6 million, needed to be relocated to Hudson to make low-end quality products. He also did not explain why eight pieces of equipment, valued at $2.5 million, were needed to be transferred to Hudson to make up for a 5-percent loss in manufacturing capacity.

The timing of the opening of the Hudson facility is critical. In February, Goss told employees that if they pursued affiliation with the UAW, jobs would be lost and the Warren facility might be closed. On June 24, the day after the first UAW meeting with employees, Stevens threatened that he would not put new equipment into a "militant environment." On July 10, a majority of the nonleader employees voted to affiliate with the UAW, and Respondent was faced with the prospect of having to bargain with the UAW. On July 16 or 17, Stevens supposedly signed an agreement to purchase the Hudson facility. On August 7, Stevens announced to the negotiating team that the decision had been made to relocate equipment to the Hudson facility. Stevens' repeated statements of union animus, the timing of the purchase of the Hudson facility, and the lack of a single document to support the two asserted business justifications, lead me to conclude that Respondent's sole motive in relocating the two Formax headers, as well as the six other pieces of equipment, was to open a nonunion facility as a hedge against the day that Respondent might be compelled to bargain with the UAW. That Respondent may ultimately be found by the Board not to have an obligation to bargain with the UAW does not change the illegality of its discriminatory motivation in relocating the equipment. Respondent has therefore not met its burden of persuasion that the equipment would have been relocated in the absence of employees attempting to affiliate with the UAW, and I find Respondent violated Section 8(a)(1) and (3) of the Act.

I further find that Respondent violated Section 8(a)(1) and (5) of the Act. The relocation of the equipment was a mandatory subject of bargaining and Respondent had an obligation to bargain over the decision and its effects. First, the decision to relocate the machinery was discriminatorily motivated, and the Board has held that where antiunion considerations are at the heart of a change in the direction of a corporate enterprise, there is an obligation to bargain. *Joy Recovery Technology Corp.,* 320 NLRB 356 fn. 3 (1995); *"Automatic" Sprinkler Corp*., 319 NLRB 401 (1995). Second, the decision impacted directly on unit employees in that one unit employee was terminated and approximately six unit employees were transferred from the Warren facility to the Hudson facility. Third, cheaper labor costs in Hudson, Indiana, was a factor considered by Respondent in making the decision.

Stevens' announcement at the August 7 meeting that he had already made the decision to transfer the equipment presented the negotiating team with a fait accompli, and did not provide the Committee with a meaningful opportunity to bargain about the decision. Respondent thereby violated Section 8(a)(1) and (5) of the Act.

Contrary to the General Counsel's position, I find that Respondent did bargain with the Committee concerning the effects of the decision to relocate the machinery. The balance of the August 7 meeting was spent discussing the impact of the decision on the unit, and Galvan testified that several sessions were conducted concerning the termination of Terry Thomas. It is the General Counsel's burden to prove by a preponderance of the evidence that Respondent failed to bargain in good faith about the effects of its decision, and I conclude that there is insufficient evidence of such a failure. Accordingly, I recommend dismissal of that portion of the complaint.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Committee and the UAW are each a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material here, the Committee has been the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time production and maintenance employees, excluding clerical employees, temporary and part-time employees, professional employees, sales personnel, guards and supervisors as defined in the National Labor Relations Act.

4. Respondent, by Dave Goss, violated Section 8(a)(1) of the Act in February by threatening employees with job loss and plant closure if they supported an affiliation between the Committee and the UAW.

5. Respondent, by Derek Stevens violated Section 8(a)(1) of the Act on June 24 by interrogating employees about their activities in support of an affiliation between the Committee and the UAW.

6. Respondent, by Derek Stevens, violated Section 8(a)(1) of the Act on June 24 by threatening employees with job loss, threatening to transfer equipment out of the Warren facility, and threatening adverse consequences to employees' families if employees supported an affiliation between the Committee and the UAW.

7. Respondent violated Section 8(a)(1) of the Act on July 3 by distributing a letter to employees which conveyed to them the futility of supporting an affiliation between the Committee and the UAW.

8. Respondent violated Section 8(a)(1) of the Act on July 9 by distributing a memo to employees which threatened adverse economic consequences if employees supported an affiliation between the Committee and the UAW.

9. Respondent violated Section 8(a)(1) and (3) of the Act by failing to install two Formax headers in its Warren facility, and by transferring six pieces of equipment from its Warren facility

to its Hudson facility because employees engaged in activities in support of an affiliation between the Committee and the UAW.

10. Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with the Committee about the decision to install two Formax headers in its Hudson facility and about the decision to transfer six pieces of equipment from its Warren facility to its Hudson facility.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily relocated equipment to its Hudson facility must restore this equipment back to its Warren facility. Respondent argues that such a restoration order would be punitive. In support of the argument, Respondent avers that bargaining unit employees suffered no loss as a result of the relocation of the equipment, and that the Warren facility has no room or ability to make productive use of the returned equipment. Respondent's argument is without merit. First, employees were adversely affected by the relocation of the equipment. One employee was terminated and six employees were transferred to a facility 165 miles away. Second, Respondent introduced evidence that it will cost approximately $150,000 to relocate the two Formax headers to the Warren facility. No evidence was adduced as to costs that would be associated with the transfer of the other six pieces of equipment, and the mere assertion that Respondent will not be able to make "productive use" of the returned equipment is not sufficient to establish that a restoration remedy would be unduly burdensome. I also find that having litigated the issue at the hearing of this matter, Respondent should not be allowed to relitigate the issue at the compliance stage of the proceedings.

Respondent shall also make whole for any loss of earnings and other benefits all employees who were terminated, transferred, or whose terms and conditions of employment were in any manner adversely affected as a result of the relocation of the equipment. The amounts to be paid shall be computed on a quarterly basis from the date of the termination, transfer, or other adverse action, to the date of proper offer of reinstatement, or to the date of proper offer of transfer, or to the date of the recision of the adverse action, as applicable, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall offer each of the discriminatorily terminated and transferred employees reinstatement at its Warren facility to a position that is substantially equivalent to the employees' former position, with appropriate moving expenses where applicable, giving the employees preference in order of seniority. In the event of the unavailability of jobs sufficient to permit immediate reinstatement of all such employees, Respondent shall place those for whom jobs are not now available on a preferential hiring list for any future vacancies which may occur in substantially equivalent positions within Respondent's Warren facility.

Respondent shall bargain with the Committee concerning the decision the relocate equipment to its Hudson facility and with respect to the effects of the return of the equipment to the Warren facility pursuant to the Order here.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Cold Heading Company, Warren, Michigan, and Hudson, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with job loss, plant closure, or other adverse economic consequences because employees support an affiliation between the Committee and the UAW.

(b) Threatening adverse consequences to employees' families because employees support an affiliation between the Committee and the UAW.

(c) Threatening to relocate equipment to other facilities because employees support an affiliation between the Committee and the UAW.

(d) Interrogating employees about their support for and activities on behalf of an affiliation between the Committee and the UAW.

(e) Conveying to employees the futility of supporting an affiliation between the Committee and the UAW.

(f) Relocating equipment because employees support an affiliation between the Committee and the UAW.

(g) Refusing to bargain with the Committee about the decision to relocate equipment to its Hudson facility.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain with the Committee as the exclusive representative of the employees in the following appropriate unit concerning the decision to relocate equipment to Respondent's Hudson facility and the effects of the return of the equipment to the Warren facility pursuant to the terms of this Order:

> All full-time production and maintenance employees, excluding clerical employees, temporary and part-time employees, professional employees, sales personnel, guards and supervisors as defined in the National Labor Relations Act.

(b) Within 14 days from the date of this Order, offer Terry Thomas full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Within 14 days from the date of this Order, offer to all employees transferred from the Warren facility to the Hudson facility full reinstatement to their former jobs in the Warren

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

facility, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days from the date of this Order, rescind any adverse action taken against any employee as a result of the relocation of equipment to the Hudson facility.

(e) Make Terry Thomas whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(f) Make all employees who were transferred to the Hudson facility whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(g) Make all employees against whom an adverse action was taken as a result of the transfer of equipment to the Hudson facility whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(h) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Warren, Michigan facility and at its Hudson, Indiana facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 19, 1996.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."